No. 222.

Brief of Taggart for T. & P. Co.

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 222

Filed Jan. 24, 1899.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

JOHN HENRY CLAYTON, NICHOLAS ROBERTS and CHARLES ANDERSON EARLE,
Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

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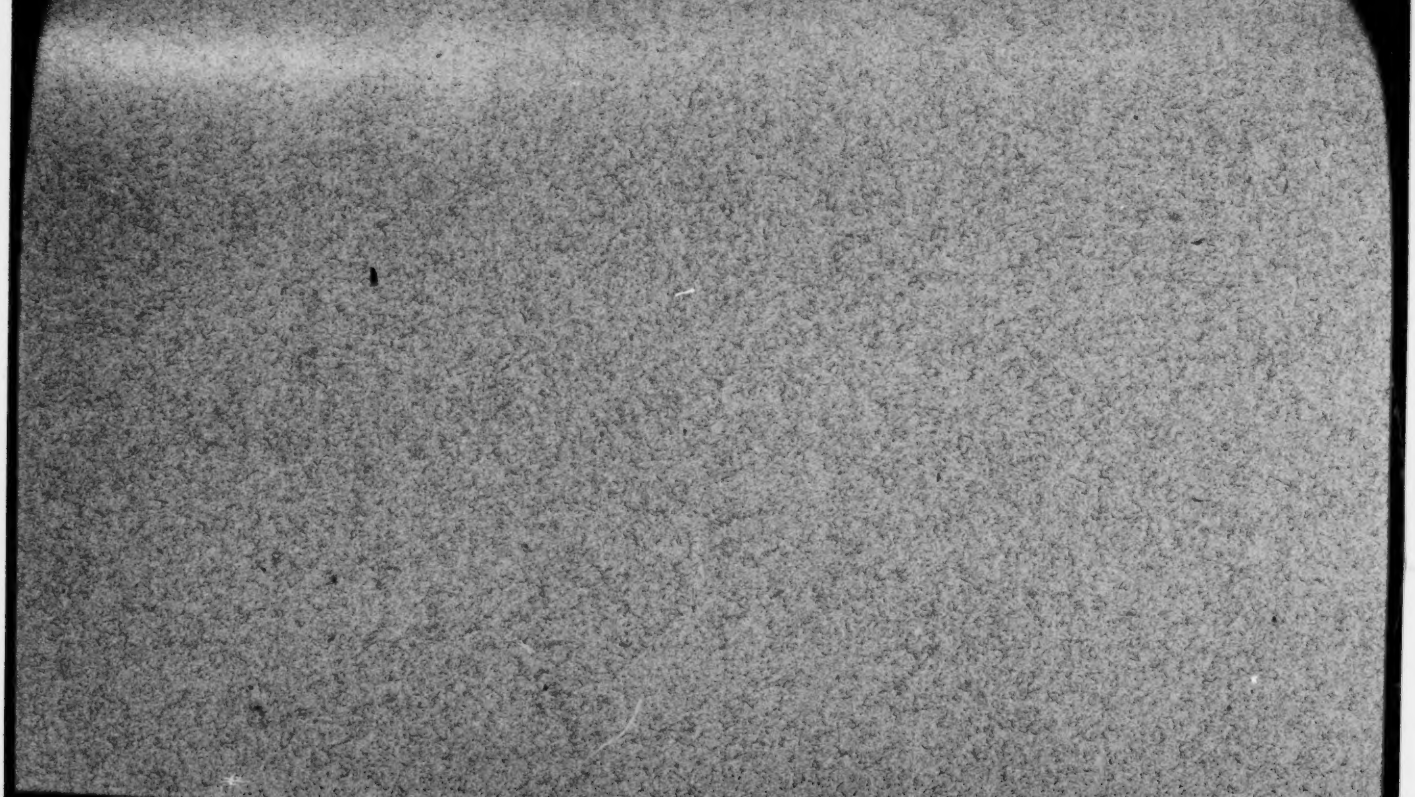

INDEX.

Supreme Court of the United States.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

AGAINST

JOHN HENRY CLAYTON, NICHOLAS ROBERTS and CHARLES ANDERSON EARLE,
Defendants in Error.

Statement of the Case.

This case comes into this Court upon a writ of error alleging error in the action of the Circuit Court of Appeals, in the Second Circuit, affirming a judgment which was entered upon a verdict directed in favor of the plaintiffs upon the trial of the case in the Circuit Court. The action was brought in the Circuit Court to recover $17,314.48 damages alleged to have been suffered by the plaintiffs, by the burning of 467 bales of cotton on the 12th of November, 1894, at Westwego, in the State of Louisiana.

Character of Pleadings.

The essential allegations in the complaint filed by the plaintiffs are that plaintiffs were cotton merchants doing business in the City of Liverpool, England, and the de-

fendant, as a railroad corporation, was engaged in conducting the business of a common carrier of merchandise for hire from various places in the State of Texas to Westwego, in the State of Louisiana; that in October, 1894, the plaintiffs delivered to the defendant as a common carrier at Bonham, Texas, 500 bales of cotton, which the defendant then and there received and undertook and agreed as a common carrier to carry from the place of shipment, to Liverpool, England, by way of New Orleans, and at Liverpool to deliver the same to the plaintiffs upon the payment of freight; that the defendant failed to keep this undertaking, and to carry 467 bales of said cotton as agreed; but that, through the negligence and carelessness of the defendant, and without fault of the plaintiffs, 467 bales of this cotton were, "on the 12th of November, 1894, wholly destroyed by fire at Westwego, in the State of Louisiana, at which time and place the same were in the possession of the defendant in the course of such carriage as a common carrier as aforesaid" (Record, p. 3.)

The answer of the defendant admitted its existence as a railroad corporation, and admitted the delivery to it of certain cotton, the number of bales specified, denied the undertaking to carry and deliver as alleged in the complaint; admitted the destruction of the 467 bales of cotton by fire at Westwego, in the State of Louisiana, but denied every other allegation relating to the loss of said cotton contained in the complaint (Record, p. 5.) Upon these issues the cause went to trial at the April Term of the Circuit Court in 1897, before the Hon. E. HENRY LACOMBE, Circuit Judge, and a jury.

Facts.

The facts developed upon the trial were that the plaintiffs were partners doing business in the City of Liverpool, England, under the firm name of Newell & Clayton; that in October, 1894, through their agents, Castner & Co., at Bonham, Texas, they delivered to the defendant the Texas and Pacific Railway Company four lots of cotton, the delivery being evidenced by four bills of lading, which were offered in evidence and which appear in the record, pages 91 to 99, inclusive. These bills of lading are identical in form, with the exception of the number of bales, the marks of the cotton and the numbers of the bills of lading. After offering the bills of lading in evidence, the plaintiff also offered proof of the value of the cotton, calculated according to certain stipulations entered into by the parties, and rested.

Thereupon the defendant moved the Court for a direction of a verdict for the defendant upon the grounds:

1st. That under the issues joined between the parties, the plaintiffs had failed to establish their complaint in its entire scope and meaning; and

2d. That under the issues in the case the plaintiffs had alleged that, at the time of the loss of the cotton, it was in the possession of the defendant as a common carrier, in the course of carriage from Bonham, Texas, to Liverpool, England, and that there was an entire absence of proof to sustain this allegation, which was denied by the defendant in its answer.

The motion for such direction, upon both grounds, was denied by the Court, and thereupon the defendant

introduced proof in its behalf respecting the shipment and handling of the cotton in question.

The facts as developed by the defendant were undisputed. The proof showed that all these bills of lading were based upon what was known as "Texas and Pacific contract No. 44" (Record, p. 46), which was in substance a contract with Elder, Dempster & Co., as steamship carriers, to connect with the Texas and Pacific Railway Co., and receive from that company 20,000 bales of cotton, during the months of October, November and December, 1894. The place agreed upon with Elder, Dempster & Co. for the receipt of this cotton by the steamship line was at the wharf at Westwego. The uncontradicted testimony of Mr. Sargent, general freight agent of the defendant, is that there was an express agreement between the steamship company and the defendant that the place of delivery of this cotton under this agreement was the wharf at Westwego (Record, p. 83). This wharf was at the terminus of a spur or branch of the defendant's line of railway on the bank of the Mississippi River, and was built out over the river far enough so that cars could be run upon tracks in the rear of the wharf and unloaded, and vessels come to the front of the wharf and receive the freight thus unloaded (Record, pp. 75-83). It was the property of the defendant.

Method of Business.

The testimony as to the method of transacting business between the railway company and the steamship company shows that upon the shipment of cotton, bills of lading would be issued in Texas to the shipper; that thereupon the cotton would be loaded in cars of the

railway company, and a way bill indicating the number and initial of the car, the number of the bill of lading, the date of shipment, the number of bales of cotton, the consignor, the consignee, the date of the bill of lading, the number of bales forwarded on that particular way-bill, the marks of the cotton, the weight, rate, freights, amount prepaid, &c., would be given to the conductor of the train bringing the car to Westwego (Testimony of Miller, p. 34; form of way-bill, p. 103); that upon the receipt of the way-bill and car at Westwego, a skeleton would be made out by the clerks at Westwego, for the purpose of unloading the car properly. The form of this skeleton is found at page 104, and contains the essential items of information covered by the way-bill, except that it had also the date of the making of the skeleton; that, when this skeleton had thus been made out and the car had been pushed in on the side track in the rear of the wharf, this skeleton would be taken by a clerk known as a "check-clerk," and with a gang of laborers, who actually handled the cotton, the car would be opened, and, as the cotton was taken from the car bale by bale, the marks upon it would be examined to see that they corresponded with the items on the skeleton, and the same were then checked; that the cotton thus taken from the car was deposited at a place upon the wharf designated by the check-clerk, where it would remain until the steamship company came and took it away (Testimony of Wilkinson, Record, p. 77); that, after the checking of the cotton in this way to ascertain that the amounts, marks and general information of the way-bill was correct, the skeleton would be transmitted to the general office of the Texas and Pacific Railway Company in New Orleans, which thereupon would make

out what it designated as a "transfer sheet" (the form of which will be found, Record, p. 105), which again contains substantially the information contained in the way-bill, and which was at once transmitted to the steamship company or its agents, and was a notification understood by the steamship company's agents that cotton for their line was on the wharf at Westwego ready for them to come and take away (Testimony of Miller, Record, pp. 48, 55; Testimony of Warrener, p. 84).

Upon the receipt of these transfer sheets, the steamship company would collate the transfers relating to such cotton as was destined by them for a particular vessel and advise the railway company, with the return of the transfers, that this cotton would be taken by the vessel named, and would thereupon send the vessel with their stevedores to the wharf at Westwego (Testimony of Miller, p. 48; Testimony of Warrener, pp. 84, 85). The clerk at Westwego would go around the wharf and by the aid of the transfers returned from the steamship agents point out to the master or the mate of the vessel, or the one in charge of the loading, the particular lots of cotton named in the transfers and designated for this vessel, and the stevedores and their helpers would thereupon take the cotton and put the same on board the ship (Record, p. 49). In connection with the loading upon the vessel or after the cotton was pointed out in lots, the master or mate would sign a mate's receipt for this cotton (*Id.*).

The stevedores and all men employed in loading the vessel were wholly in the employ of the steamship company (Testimony of Wilkinson, Record, pp. 77, 78). The times of coming to take cotton from the wharf

were wholly in the control of the steamship company. They sent for it as soon as they were ready (Testimony of Warrener, pp. 84, 85).

Facts as to this Cotton and its Loss.

The particular cotton involved in this suit had been shipped in Texas some weeks prior to the fire on the 12th day of November, 1894. The four bills of lading covering it, Nos. 28, 2[illegible], 35 and 61, bear date, respectively, October 10th, October 10th, October 15th and October 23d (Record, pp. 92, 93, 95, 97).

Nearly all of this cotton was received and unloaded upon the wharf at Westwego, and ready for its removal by the steamship company during the month of October. The last lot to arrive was received on the 3d of November, 1894, and the last lot was unloaded and placed on the wharf on the 4th of November (see Schedule A, Record, p. 107, where the dates of arrival and unloading of the various lots are tabulated).

Transfer sheets for most of the cotton involved in this suit and covered by the above bills of lading were sent to Elder, Dempster & Company in a letter bearing date November 2d (Record, p. 62) and the remainder of the transfer sheets were transmitted by letter bearing date November 9th (Record, p. 62).

The fire did not occur until the evening of November 12th. On that day a letter had been sent by Elder, Dempster & Company to the defendant (Record, p. 69) returning various transfer sheets covering 3,772 bales of cotton and directing their delivery to the S. S. "Leyden." The agent of the steamship company testified (Record, p. 86) that they then had no other transfers on hand, saying: "I think we had cleared every one out of the

office and sent them back to the T. & P. Railroad." The letter of November 12th covered transfers other than those involved in this suit, and it therefore follows that all the transfers covering the cotton now in question must necessarily have been returned to the Texas and Pacific office prior to November 12th, the date of the fire.

It thus appears that the cotton in question was for some time before the fire all in position ready to be taken by the steamship company from the place on the wharf where it had been unloaded, that the steamship company had been notified of that fact, and had acknowledged such notification, and signified its readiness to take the shipment.

Although the return of the transfer slips from the steamship company to the railway company was regarded as indicating the readiness of the former to load the cotton, as matter of fact the steamship company had not been ready for some days prior to November 12th, by reason of delays in the arrival of vessels, to take all the cotton which awaited shipment. The steamship "Leyden," for example, which was designated in the letter of November 6th (Record, p. 64) to receive the cotton therein referred to, did not, in point of fact, arrive on the wharf until about the 12th (Record, p. 86). Mr. Warriner, the steamship agent, says: "I don't know exactly now what was the reason. She was very late—she should have been in four or five days before that. She made a very long passage."

It further appears that on the very morning of the fire and on other occasions prior thereto, both in October and November, the officers of the railway company gave verbal notice to the steamship company that the cotton was upon the wharf ready for the steamship

company to take away, and made request that the same should be removed. The attention of the steamship company's officials was called to the amount of cotton on the wharf that they had contracted to carry, and they were requested to remove it at the earliest possible moment, and to comply with their contract. In reply, they said, in substance, that their ships had been delayed, the principal cause, however, being certain labor troubles with employees of the steamship companies, then existing in New Orleans, and also that some of their ships had been delayed by bad weather (testimony of Pearsall, p. 82).

No evidence was offered on the part of the plaintiffs tending to show any negligence of the defendant in connection with the wharf, or in connection with the fire causing the loss, or tending in any way to cause the loss.

At the close of the testimony the plaintiffs moved for a direction of a verdict upon the ground that the proof clearly showed that the cotton, at the time of the loss, was in the possession of the defendant as a common carrier and under the provisions of the bill of lading, that the defendant was responsible for its loss or destruction (Record, p. 87).

The defendant moved for a verdict upon two grounds, first, that the evidence showed a delivery to the steamship company, the connecting carrier; second, that under the facts, if there had not been a delivery to the steamship company, there had been a tender of the cotton to the connecting carrier, and that thereafter the railway company held the cotton simply as a warehouseman, and there being no proof of any negligence, that it would not be responsible as such (Record, p. 87).

The Court granted the motion of the plaintiff, denied the motion of the defendant, and granted exceptions to the motion to direct a verdict in favor of the plaintiff and to the denial of the motion on each of the grounds specified on behalf of the defendant.

Assignment of Errors.

Errors were assigned in the Circuit Court of Appeals as follows :

First. That the Court erred in denying the motion of the defendant to direct a verdict in favor of the defendant when the plaintiffs rested their case.

Second. That the Court erred in directing a verdict for the plaintiffs.

Third. That the Court erred in refusing to direct a verdict for the defendant at the conclusion of the testimony, upon the ground that the testimony showed that there had been a delivery of the cotton sued for to the connecting carrier, the Elder Dempster & Company line of steamers.

Fourth. That the Court erred in refusing to direct a verdict for the defendant at the conclusion of the testimony, upon the ground that the defendant's relation to the plaintiffs was that of warehouseman and not that of common carrier (Record, p. 108).

The assignments of error in this Court are as follows (Record, p. 119 :)

First. That the said Circuit Court of Appeals erred in affirming the judgment of the Circuit Court rendered

against the Texas and Pacific Railway Company, plaintiff in error, and in favor of the defendants in error upon the trial of said cause.

SECOND. That the said Court erred in holding that the Circuit Court committed no error in denying the motion of the Texas and Pacific Railway Company upon the trial of said cause to direct a verdict in favor of the Texas and Pacific Railway Company when the defendants in error rested their case.

THIRD. That the said Court erred in holding that said Circuit Court had properly directed a verdict in favor of the defendants in error upon the trial of said cause.

FOURTH. That the said Court erred in holding that the Circuit Court was right in refusing to direct a verdict for the Texas and Pacific Railway Company upon the trial of said cause, at the conclusion of the testimony, as requested by said company, upon the ground that the testimony showed that said company had made a delivery of the cotton sued for to the connecting carrier the Elder, Dempster & Company line of steamers.

FIFTH. That the said Court erred in affirming the action of the Circuit Court in refusing upon the trial of said cause to direct a verdict for the Texas and Pacific Railway Company at the conclusion of the testimony, as requested by said company, upon the ground that the Texas and Pacific Railway Company held said cotton sued for at the time of its loss as warehouseman and not as common carrier.

POINTS.

I.

Upon the evidence in this case the defendant, the initial carrier, had fully performed the duty which it had undertaken in its contract of carriage by making delivery of the cotton to the next succeeding carrier.

(a) It had deposited the cotton in the place agreed upon between it and the steamship company as the place where freight intended for shipment by the latter would be received by it.

> *That title to the wharf was in the railroad company, and that the wharf was in general charge of its employees is immaterial. The wharf was, for purposes of delivery of cotton to steamship company, its wharf.*

(b) Notice of such deposit had been given to and acknowledged by the steamship company.

> *That the cotton had not been formally checked off and receipted for is not material.*

(c) When so deposited nothing further remained to be done by the railroad company to fulfill its obligations under the contract, and it rested in the discretion of the steamship company as to when and how the cotton should be removed.

> *The fact that the bill of lading contains the clause, "with liberty to ship by any other steamship or steamship line," is of no importance. That clause was for the benefit of the steamship company and imposed no duty on the defendant.*

II.

But assuming that there was not such a delivery to the steamship company as to release the defendant, we urge that upon the facts shown the defendants held these goods as warehousemen only—not as common carriers.

(a) The relation between connecting carriers is substantially the same as that between shipper and carrier. The notice given by the railroad company, and acknowledged by the steamship company should have been sufficient to make the former a warehouseman, under the authorities, as against a shipper.

(b) The provision in the bill of lading, fixing the liability on the carrier in whose actual custody the goods might be at the time of loss, does not upon the facts of this case fix a liability upon the defendant.

ARGUMENT.

I.

Under the evidence in this case, the defendant, the initial carrier, had fully performed the duty which it had undertaken in its contract of carriage.

The language of the contract is as follows:

"1. That the liability of the Texas & Pacific Railway Company in respect to said cotton under this

contract is limited to its own line of railway, and will cease and its part of this contract be fully performed upon delivery of said cotton to its next connecting carrier" (Record, pp. 91, 93, 96, 98).

The facts respecting the manner of shipment of this cotton are uncontradicted. The bill of lading fixes an entire rate of freight from the point of shipment to Liverpool, England. The entire rate or through rate of 111 cents per hundred pounds, under the provisions of Texas and Pacific contract No. 44, was divisible into two parts. The rate from point of shipment to New Orleans was the railroad's proportion, and the rate from New Orleans to Liverpool was the steamship company's proportion. By contract No. 44, the proportion secured to the steamship company was 49.21 cents per hundred pounds (Record, pp. 46, 55, 56).

Upon the trial and in the brief of the defendant in error below the claim was insisted upon that there was no delivery of this cotton to the steamship company for the reason that the bill of lading provides that the railway company should carry to the port of New Orleans and there deliver to the Elder, Dempster & Co. steamship line, and that Westwego under the proofs is shown not to have been within the legal limits of the custom-house district defining the port of New Orleans at this time. Therefore that the delivery to Westwego was not a compliance with the provisions of the bill of lading. We submit that this is entirely too narrow a construction of the provisions of this instrument. As a commercial instrument, it was to be construed in accordance with the conduct of commercial business at New Orleans and with the arrangements shown to exist between Elder, Dempster & Company and the railway company, and that a

delivery at the usual place, as the same was recognized not only by this steamship company but the other steamship companies, would be a compliance with this requirement of the bill of lading. That it was within the recognized commercial limits of the port as part of the "port of New Orleans," we refer to the testimony of Miller as to the custom of shipping there (Record, p. 70). Also, that the Board of Harbor Masters recognized Westwego as under their jurisdiction (Testimony of Roth and Cope, pp. 72, 73). The trial Court also considered it as included within the port of New Orleans by indicating that no further testimony need be given tending to establish the proposition (Record, p. 76). Evidently it was within the contemplation of the parties to this bill of lading that the point of connection of the two carriers' lines was to be the wharf at Westwego; and although the testimony does not, as we think, establish that Westwego was not within the legal limits of the port of New Orleans as defined by the Acts of Congress, yet we insist that, within the meaning given to this contract by the parties to it, the contract was performed by delivery at Westwego. It falls within the exact principle of the case decided by BROWN, J., in Devato against 823 Barrels of Plumbago, 20 Fed. Rep., 510, in which case a delivery at Brooklyn, under a bill of lading consigning the goods to the "port of New York," was held to be compliance with the requirements of the bill of lading, although Brooklyn was within another collection district.

Nature of Contract of Shipment.

The first question which arises is, What were the respective duties of the Texas and Pacific Railway Company, and the steamship company under and in view of the arrangements that had been made between them and by each of them with the shipper? The Texas and Pacific Railway did not contract to carry this cotton from Bonham, Texas, to Liverpool, England. This is indisputable under the decisions of this Court. The question was presented to this Court in Insurance Co. vs. Railroad Co., 104 U. S., 146. A dispatch company had entered into contracts with railway companies forming a continuous line for the shipment of freight, and one of the railway companies was sued under a bill of lading issued by the dispatch company, and it was claimed the companies forming this despatch line (or whose lines connected formed the despatch line) had undertaken jointly with the parties shipping over the line; but it was held that such arrangement did not involve joint liability, nor did the division of the aggregate pay for the entire route between the companies forming the line involve them as partners, but, on the contrary, each company under the arrangement simply undertook to transport over its own line and deliver to the next succeeding carrier, and that the defendant in the case had delivered the cotton involved in that suit to the next carrier, and the loss having occurred while it was upon this other carrier's line, it was not responsible.

In the case of Myrick vs. The Mich. Central R. R. Co. (107 U. S., 102), a similar ruling is made and a similar declaration is recorded as to the duty of the initial carrier. These cases follow and approve Rail-

road Co. vs. Manufacturing Co. (16 Wallace, 318), and Railroad Company vs. Pratt (93 U. S., 43).

It is to be noted, however, that, by the bill of lading in this case, Elder, Dempster & Company's steamship line was a party contracted with by the shipper at the same time that the Texas and Pacific Railway Co. was contracted with. By the sixth paragraph of the bill of lading it is provided that the cotton shall be transported from the port of New Orleans to the port of Liverpool by the Elder, Dempster & Company Steamship line (with liberty to ship by any other steamship or steamship line), and the bill of lading delivered to the shipper is signed by an agent for the railway and steamship lines severally, but not jointly. Under the provisions of contract 44 (Record, p. 46), this contract was fully authorized by the steamship company. The contracts of the shipper, therefore, were first with the Texas and Pacific Railway Company to carry from point of shipment to New Orleans; second, with the steamship line to receive at New Orleans, from the railway company as the agent of the shipper for that purpose, and carry thence to Liverpool, England, the cotton described in the bills of lading; the steamship company, on its part, as a common carrier, agreeing with the shipper to receive at its usual place of receipt of freight, and under the usual conditions, cotton destined over its route, which it had thus contracted to receive and carry. Was there delivery to Elder, Dempster & Co.?

This brings us to the first question upon which it is urged that the Court seriously erred in directing a verdict. The Court directed a verdict in favor of the plaintiff, upon the theory, as announced, that there had been upon the facts no delivery of this cotton to the

connecting carrier, the steamship company, and that under the terms of the bill of lading it was still held by the defendant, the defendant not having fully discharged its duty in the premises. The motion of the defendant to direct a verdict in its favor was based upon the claim that, upon the facts as presented in this case, and under a proper application of the principles of law relating to connecting carriers as established by the decisions of this Court, the defendant had fully discharged its duty, and had relieved itself from liability for this cotton, at the time the fire occurred on the 12th of November, 1894.

There can be no question about the fact that the connecting carrier in this case—the Elder, Dempster & Co. line of steamships—had made the wharf at Westwego the place of delivery of cotton to it. The testimony of Mr. Sargent shows that this was not a matter arising from custom, raising an implication of assent to such arrangement, but that there was an express understanding or contract to this effect (Record, pp. 71, 82). This arrangement as to place of delivery to the steamship line, related not only to the 20,000 bales of cotton to be shipped under contract No. 44, but to shipments under the other contracts of similar import which Mr. Miller testifies were made relating to other shipments during the season of 1894–5. This material fact, therefore, appears undisputed from the evidence, that Elder, Dempster & Co. had appointed the wharf at Westwego as the place of delivery of cotton to them for this season.

The second fact is likewise undisputed, which we deem material for consideration; viz., that Elder, Dempster & Co. determined for themselves when they would go to Westwego with their ships to take this

cotton, which they had arranged to have deposited for their line at that point, and carry it from there to Liverpool, Bremen or Havre (Testimony of Warrener, p. 84). It is likewise undisputed that the initial carrier, the Texas and Pacific Railway Company, had done everything in the way of the carriage of this cotton which it could do; that it had transported the cotton from the point of shipment in Texas to Westwego, and then had unloaded it from the cars in which it had been carried from Texas to the wharf at Westwego, and then all work in the way of the transportation of this cotton, or carriage of the same, was ended; that nothing more could be done by the Texas and Pacific Railway Co. except to point out the location of the cotton upon the wharf when Elder, Dempster & Company came to take it away for carriage over their line to its destination. In fact, it may be said upon this testimony that it was not the contemplation of the steamship company or of the railroad company, that anything should be done to this cotton after its being unloaded upon the wharf, and that, if both parties had promptly and expeditiously carried out the terms of contract 44, none of the cotton would have had to receive any attention whatever, after being unloaded from the cars and placed upon the wharf (Testimony of Wilkinson, p. 77).

It is also a conceded fact that all the labor of handling this cotton after it was placed upon the wharf, and of taking it aboard the ship, was entirely under the control of Elder, Dempster & Co., who determined when that labor would take the cotton from the wharf to the ship, and how, and all the details of that feature of the transportation (Record, p. 80). It is also an undisputed fact, as is shown by the correspond-

ence between Elder, Dempster & Co. and the Texas and Pacific Railway Co., that after the cotton was unloaded upon the wharf, and transfers were made out and sent to Elder, Dempster & Co. (which were notifications to them that the cotton was upon the wharf in position for removal by them), Elder, Dempster & Company determined which lots of cotton should be taken on board particular vessels, and assumed to direct the separation or choice of the cotton on the wharf to be loaded (Record, pp. 64, 65, 67, 69, 77–84). It is likewise an undisputed fact that all the cotton involved in this case had been unloaded, and Elder, Dempster & Co. had been notified of its unloading for a considerable period before the fire of November 12, 1894, the earliest deposit of this lot on the wharf being the 22d of October, and the latest, the 4th of November (Record, p. 107). Transfer notices for the most of the cotton had been delivered to Elder, Dempster & Co. on the 2d of November, and for the remaining portion of the cotton on the 9th of November, and they had returned such transfer sheets to the railroad company prior to the 12th of November, thereby signifying their readiness to take the shipments.

Upon these facts it is earnestly contended by the defendant that there was in law a delivery of this cotton to Elder, Dempster & Co., and that the Court should have so directed the jury. The question of what is delivery to a carrier by the shipper has been the subject of considerable discussion in the courts, and many cases involving that question have been before the courts for adjudication. A smaller number of cases involving the question of what constitutes delivery as between connecting carriers have been before the courts. That there should be any differ-

ence in the essentials of what constitutes delivery between two carriers in line, the one succeeding the other in the shipment of goods, the one's liability beginning where the other's liability terminates, and delivery in the first instance from the shipper, we are unable to conceive. In the case of the shipper, the liability of the carrier, it is settled, begins the moment the goods come into the possession of the carrier; the moment the carrier's duty with respect to carrying those goods begins, that moment the shipper ceases to be responsible for their safety, and the responsibility of the carrier begins. The same line of division, we imagine, must be the ultimate test as between connecting carriers. The first carrier occupies the position of agent of the shipper in making delivery to the next carrier after it has carried to the end of its route. When the first has discharged his duty, done all in the line of transportation that he can do, and has placed the goods in the control of the second, or by the deposit of the goods where the second carrier has by agreement or custom appointed for their delivery to him, or in whatever way, has cast upon the the latter duty of thenceforward carrying those goods, determining when they shall start upon their carriage and course, that moment the responsibility of the second carrier begins, and the responsibility of the first terminates. This seems to us clearly to be the result of the decision of this Court at least, and the principles of which, applied to this case, we believe, require a determination different from that arrived at by the Court below.

Analysis of Cases Upon Delivery by Connecting Carriers.

Let us analyze the leading case of Pratt vs. The Railway Co. (95 U. S., 43), and, as nearly as we can, get at the reason of the decision in the light of the authorities which are quoted in the opinion.

In this case the Grand Trunk Railway Co. was defendant, and the action was to recover damages for failure of duty as common carrier in respect to certain merchandise shipped from Liverpool to St. Louis, and carried by the defendant from Montreal to Detroit. At Detroit the defendant had no freight room, except a single apartment in the freight depot of the Michigan Central Railroad Company. This depot was a building several hundred feet long and three or four hundred feet in width, all under one roof but divided into sections or apartments. The railroad track upon which cars were to run to be loaded with freight was in the centre of the building. The only use which the defendant had of this section allotted to it was for the deposit of goods and property which came over its road, or were delivered for shipment over it. This section, in common with the rest of the building, was generally under the control of the Michigan Central Railroad Company. The defendant employed two men in this section who checked freight for it. Goods which came into the section from defendant's road, destined over the road of the Michigan Central, were, at the time of unloading from defendant's cars, deposited by the employees who unloaded them in a certain place in this section, from which they were loaded into the cars of the Michigan Central Company by its employees when they were ready to receive them. After they were so

deposited the defendant's employees did not further handle the goods. Whenever the agent of the Michigan Central would see any goods deposited in the section of the freight building set apart for the use of the defendant that were destined over the line of the Michigan Central, he would call upon the agent of the defendant, and from a way-bill he would take a list of the goods, and then for the first time learn their place of destination, together with the amount of freight charges due therefor. From this information a way-bill would be made up by the Michigan Central for the transportation of goods over its line of road, and not before.

The particular goods involved in this suit were, on the 17th of October, taken from the cars of the defendant and deposited in that part of the apartment or building used by the defendant, as the place for goods destined over the Michigan Central. When these goods were forwarded from Montreal, as was customary, a way-bill was made out in duplicate, on which was entered a list of the goods, names of consignees, place to which the goods were consigned and amount of charges. One of these way-bills was given to the conductor of the train carrying the goods, and the other forwarded to the agent of the defendant in Detroit. The way-bill accompanying these goods was given to the conductor, and on the arrival of the goods the conductor delivered his copy to the checking clerk of the defendant, who checked the goods from the cars. It was the practice of the Michigan Central Railroad Company before forwarding such goods to take from this way-bill the place of destination of the goods, a list of the same and to collect the amount of accumulated charges. *The Michigan Central agent had not*

called on the agent of the defendant to learn the place of destination of the goods, and no way-bill had been made out by the Michigan Central for the transportation of the goods over its line of railway. Upon these facts it was the opinion of the Supreme Court that these acts constituted a complete delivery of the goods to the Michigan Central, by which the liability of the Grand Trunk Company, the defendant, was terminated, for four reasons:

"1. They were placed within the control of the agents of the Michigan Company.

"2. They were deposited by one party and received by the other for transportation, the deposit being accessory, merely, to such transportation.

"3. No further orders or directions from the Grand Trunk Company were expected by the receiving party, and, except for the occurrence of the fire, the goods would have been loaded into the cars of the Michigan Central Company and forwarded without further action of the Grand Trunk Company.

"4. Under the arrangement between the parties, the presence of the goods in the precise locality agreed upon, and the marks upon them, 'P. & F., St. Louis,' were sufficient notice that they were there for transportation over the Michigan road towards the City of St. Louis; and such was the understanding of both parties."

The Court specially cite in support of this conclusion two Connecticut cases, also cited in a previous part of the opinion, which we think throw very considerable light upon the question we are considering. (Merriam vs. Railroad Co., 20 Conn., 354, and Converse vs. Transportation Co., 33 Conn., 166).

As indicating the understanding of the text writers as to what these authorities really mean, we quote Hutchinson on Carriers, 2d Ed., Sec. 90, as follows:

"But, while it is the undoubted general rule that the delivery, to bind the carrier, must be made either

to him or to some one with authority from him, or who may be presumed to have such authority, it is not to be understood that it is not subject to such conventional arrangements between the parties as they may choose to make in regard to the mode of delivery, or that it may not be varied by usage or by a particular course of dealing between them. They may make such stipulations upon the subject as they may see fit, and when such stipulations are made they, and not the general law, are to govern. If, therefore, the parties agree that the goods may be deposited for transportation at any particular place, and without an express notice to the carrier, such deposit will be a sufficient delivery; and proof of a constant and habitual practice and usage of the carrier to receive the goods when they are deposited for him in a particular place without special notice of such deposit, is sufficient to show a public offer by the carrier to receive the goods in that mode and to constitute an agreement between the parties by which the goods, when so deposited, shall be considered as delivered to him without any further notice. Such a practice and usage are tantamount to an open declaration, a public advertisement by the carrier that such delivery should of itself be deemed an acceptance by him, and to permit him to set up against those who had been thereby induced to omit it, the want of the formality of an express notice which had been thus waived would be sanctioning injustice and fraud. As where, for instance, the delivery was upon a private wharf or dock used exclusively by the carrier, and upon which it had been its custom and constant usage to receive goods left there for transportation by it, such deposit in the usual and accustomed manner would be constructive notice, and would be regarded as a sufficient delivery, though the goods *were not left in charge of any of its servants.*"

Referring to the cases themselves, in the Merriam case the facts were these: Plaintiff was owner of a box of goods to be shipped over defendant's steamboat and railroad line from New York to Meriden, Conn. The box was placed upon a dock in New York belonging to defendant at the usual place where freight destined for the boat was left. The box was lost, and

the railway company defended upon the ground that the box was not delivered to it; that its servants had no notice of the delivery of this box, and that it had never come into its possession. The Court say that no common carrier can be charged for the loss of property unless there has been delivery to the carrier; but that it being the constant, habitual practice and usage of the defendant to receive property at a dock for transportation in the manner in which it was deposited by the plaintiff, and without any special notice, such deposit was competent, and, in the case, sufficient to show a public offer by the defendant to receive property for that purpose in that mode; and that, if this property was delivered in accordance with such usage upon the dock at the place where the defendant was accustomed to receive the property, and take it away from there for carriage thereafter at its convenience, the deposit there by the plaintiff, even without notice to the defendant, was a delivery to the defendant of the property thus placed. They liken such deposit of property to the deposit of a letter in the post-office or foreign mail, and to a deposit of articles for carriage in a public box provided for that purpose by an express company.

In the succeeding case of Converse vs. Norwich and Northern Transportation Co. (33 Conn., 166), which is the case cited as special authority for the conclusions in Pratt vs. Railway Co., the facts were that the transportation company, defendant, was a common carrier between New York and New London. The wool, for the loss of which this suit was brought, was taken on board one of their vessels and carried to New London, put into the depot building on the wharf during the night of Saturday, May 7, and was destroyed by fire on the

afternoon of Sunday, May 8. The wool was bound for Stafford, Connecticut. The defendant and the New London and Northern Railroad Co. had an agreement by which they connected at New London. The railroad company had agreed to "build and furnish a good and "substantial wharf at New London on Water street, "of certain dimensions and for the use of such wharf, "depot building, &c., the transportation company and "the Norwich and Western Railroad Company are to "pay jointly to the New London and Northern "Railroad Co. an annual rent of $4,000." The goods were deposited by the defendants in the usual place of deposit for freight destined for points on the line of the railroad. *The common course of business in regard to such freight was for the defendants to make out a way-bill of the several articles brought to the dock and hand it to the agents of the road at New London shortly after the arrival of the boat.* The railroad company employees loaded the freight on their cars, taking it from the place where the defendant deposited it and checking each article on the way-bill as it was taken up. If any article described in the way-bill was not found, or was in bad order, the defendant looked it up, or put it in proper condition. In the case of through freight, the clerk of the boat transporting it was accustomed to make out a bill for the whole freight upon each parcel, and hand it with the way-bill to the agent of the railroad company at New London.

It does not clearly appear in the statement of facts whether these particular articles of freight were, in accordance with the custom, checked upon the way-bill by the agent of the railroad company, or that the way-bill had been delivered to the agent of the railroad

company as was customary; but a request to charge on the part of the defendant set out in the record would seem clearly to indicate that these things had not been done as to this particular shipment of goods, for we find (p. 172), the following request to charge:

"The defendants also claimed and requested the "Court to charge the jury that, if the goods of the "plaintiffs were not delivered to the New London and "Northern Railroad Company until they were checked "by that company upon the way-bill and put into their "cars, they were held by the defendant after they "were deposited in the depot in the customary "manner not as common carriers, but as warehouse-"men, and, therefore, the defendants were not liable "in this action."

Upon these facts the Court say upon the question of delivery to the railroad company (p. 181):

"It must be conceded that the defendants have transported the wool to their terminus, and carried and placed it in the common depot by the side of the railroad track, at a spot where they by usage were expected by the northern road to place it, *and that no other or further act of carriage or actual manual possession was or could be expected of them. And so it must be conceded that actual manual possession had not been taken by the northern road, nor is there any direct evidence of an express agreement that the carriage to, and placing at the side of the track, in the depot, should be deemed a delivery to the road.* And, at first sight, it would seem just and equitable to hold that the carriage in fact was finished by the transportation company, and that the goods were in deposit by mutual arrangement in a joint depot, to await an actual manual reception by the northern road at a future convenient hour; and so, looking to the equities of the case and the large amount involved in the other cases dependent upon the decision of this, we should be very willing to hold, if we could do so consistently with principle. But there are insuperable difficulties in such a view of the case.

"We have no difficulty in determining, indeed we must hold, that there was a mutual agreement or tacit

understanding equivalent to such an agreement that *the transportation company should place the through freight at that precise spot, and that the northern road should take it from thence at a time convenient to them.* The construction of the depot and the uniform usage are conclusive of it. The depot was constructed with a platform by the side of the track for the reception of goods to be taken from or put into the cars; and on that platform the railroad company, in the first and every instance of delivery by them, placed their freight, *and the transportation company at their convenience took it away and carried it on board their boat. And so the transportation company in like manner, in the first and every instance, placed there the freight for the northern road, and they at their convenience put it in their cars and took it away.* And the usage was precisely the same with the Worcester road. It would be a forced construction of this usage, or rather the agreement inferable from it, to say that an intermediate joint deposit was contemplated. Moreover, the depot was not the joint depot of the two parties only, or erected for that purpose only, but the joint depot of three, including the Worcester road, and erected for and used by each, not only for the mutual delivery and reception of through freight, but independently in transacting their independent local business. Again, the defendants were carriers by water, and their place of landing and delivery must necessarily or would naturally be a wharf. This depot was a wharf, covered and enclosed indeed, but still a wharf, and the only one occupied by them. Upon this wharf and into the enclosure the northern road laid their track for the delivery and reception of freight to and from the transportation company. Both parties then contemplated a delivery and reception on this wharf and in this enclosure, and obviously in the precise manner actually pursued. *If a carrier by water notifies the consignee of his arrival and readiness to deliver the goods, and the consignee says to him 'land them in a particular place, on a particular wharf, and I will take them away at my convenience,' and he so lands them, it is a delivery.* And what he says in a particular case expressly he may say for all cases and by his conduct or by usage. And so these connecting carriers practically if not expressly said to each other. It is clear then that both the transportation company and the northern road contemplated

that a placing of freight by either intended for the other upon that platform was all that either was to do by way of delivery of their freight to each other; that they did not contemplate such placing as an immediate deposit, to be watched by the party depositing, or as a joint deposit, at the joint risk and in the joint possession of both; but that they relied on the enclosure as a protection, and considered the placing of the freight in the usual spot upon the platform as a delivery.

"The minor facts respecting the time and manner of delivering the way-bills—the examination of the freight and checking of the way-bills to be sure that all had been delivered—the proportionate extent and manner of their joint use and possession of the depot—the looking up or paying for missing goods—and the practice of letting the Saturday freight remain on the platform until Monday morning—are only material as they bear upon the great question, namely, what was it agreed or understood between the defendants and the northern road should constitute a delivery from one to the other?"

Result of Analysis.

If we stop now at these cases and carefully consider them, it seems evident that the common principle which is found in the three cases is that which is first enunciated in Merriam vs. Hartford and New Haven R. R. Co., that the carrier becomes liable upon the delivery of the goods to it, and that, as stated in the Converse case, if the carrier either expressly, or, as the result of custom, says to the shipper, "*Land your goods for me in a particular "place, on a particular wharf, and I will take them "away at my convenience," that then the landing of the goods at that place is a delivery to the carrier, who has thus stated his readiness to receive them.* That this is the principle underlying the decision of Pratt vs. Railway Co. is shown by the case of The Illinois Central Railroad Company vs. Smyser & Co. (38

Ill., 354), which is also cited with approval in the body of the decision. In this case the facts developed this mode of doing business: Williamson, Haynes & Co., commission merchants at Cairo, Ill., received cotton from the steamboat a few days prior to the 23d of October and piled it on the open levee in the rear of their wharfboat. The mode of doing business then at Cairo was: When warehousemen have cotton to ship by rail they apply to the company for the requisite number of cars, and they are sent on the side-track of the company to the warehouse, and the shipper there loads the cotton upon the cars and makes out a manifest and leaves it with the agent of the company, *who has the bales counted, and, if found to be correct, a bill of lading is signed* and a locomotive sent to remove the loaded cars and to place them in the train destined to the point to which shipment is made.

On the morning of the 23d, Williamson, of the firm of Williamson, Haynes & Co., gave notice at the office of the company that he had a carload of cotton to ship, and requested a car for that purpose. A car was taken down on the side-track to a point opposite his boat, about 10 A. M., and left in charge of Williamson, Haynes & Company, and during the day they loaded the cotton into the car. The agents of the defendant were notified at their office in Cairo that the cotton was loaded on the car, and manifests of the number of bales and amount of charges were presented to the agents on the evening of the same day at their office. *The cotton was left standing on the side-track where it was loaded, but the bales had not been counted and no bill of lading or receipt had been given for it.* On the morning of the 24th of October the cotton was consumed by fire, com-

municated to it, as supposed, by a spark from a passing locomotive. The action was brought by the plaintiffs, who were the owners of the cotton, to recover for the loss thus occasioned.

It was contended on behalf of the defendant that the cotton at the time of its destruction was in the possession of Williamson, Haynes & Co., and was not in the possession of the railroad company, and that it had not yet received it either as a carrier or for safe-keeping. This contention was founded upon the fact that the agent of the company had not counted the bales, or made out a bill of lading, or accepted the cotton by the issue of a receipt or bill of lading, and that only after this was done, the universal custom was for the company to send a locomotive and remove the car from the possession of the shipper to the company's main tracks. The Court says, Chief-Justice WALKER delivering the opinion (p. 381):

"It is not the mere signing a bill of lading which transfers the possession of freight to the company, but it is the evidence that they have received possession. Their possession may be shown by any other legitimate evidence. The liability of the common carrier is fixed by accepting the property to be transported. If, however, goods are placed on his cart, boat or car without his knowledge or acceptance or that of his agent, he is not liable (Angell on the Law of Carriers, Sec. 140). If the owner or person having the custody of the goods to be shipped never parts with their possession, or does not place them under the control of the carrier, there is no bailment, and consequently no liability incurred *(Ibid.)*. But in this case the company by their acts accepted the trust. The cotton was not placed in the car without their knowledge, but it was with their express assent. Had the employees of Williamson, Haynes & Company placed the cotton on the platform of the depot, with the assent of the company to be transported, no one would doubt their liability, and yet in principle no difference is perceived."

Railway Co. vs. Murphy, 60 Ark., 333, is a case upon its facts very similar to the case last cited. In that case, as in the Illinois case, the company placed upon a side-track at a flag-station an empty car to be loaded with cotton, and its custom after loading the car was to remove the car upon notice given by the shipper of its destination, and that it was ready for removal, and subsequently to issue a receipt and bill of lading. In that case the car had been loaded and notice of the fact of loading had been given to the agent of the next station below, where such notice was customarily given. The cotton was set on fire while awaiting removal by a train.

The Court in the opinion gave controlling force to the fact that the cotton was deposited at the place appointed by the carrier, and that the shipper had done all that was in his power and all that the company required before shipment; that the moving of the car with the cotton from the place, designated by the carrier for its reception, awaited solely the convenience of the carrier. As in the Illinois case, the furnishing of the name of the consignee and the place of destination, the counting of cotton by the carrier and the issue of its receipt or bill of lading therefor--all were deemed immaterial circumstances as bearing on the question of delivery; it was held that the delivery was complete when the cotton was deposited by the shipper in the place customarily designated by the carrier as the place where cotton destined for carriage over its line would be received, and when so deposited it was in the discretion of the carrier as to when, and how it would take the cotton away from that place.

In the case at bar, the Court, in directing a verdict,

gave force—not to the fact which this Court in Pratt vs. The Railway Co., or the Courts in the cases cited with approval in that opinion, gave force to, to wit, the deposit of the goods upon a wharf or at a place which the carrier had designated as the place where it was willing to receive goods and take them away at its convenience—but to the fact that a receipt had not been signed; that the bales had not been counted; that although the cotton was upon the wharf at Westwego subject to the direction of Elder, Dempster & Co., and it was for their exclusive determination when and how it would be removed, yet, inasmuch as it had not been counted, and formally receipted for, and remained upon a wharf owned by the defendant, that no delivery had been made to the Elder, Dempster Company, although the first carrier had fully performed all the carriage and all the manual possession and holding and handling that was necessary in and about the carriage to the point where Elder, Dempster & Co. agreed to receive it. In the opinion of the Circuit Court of Appeals, the conclusion upon this branch of the case is summarized in the one paragraph:

"In the present case the cotton had never been placed within the control of the steamship line by the defendant. It was not set apart from the other cotton on the wharf awaiting transportation by other steamship lines or vessels, further than by placing it, when unloaded, near certain numbered posts in the shed, where it might remain until called for or might be removed by the defendant to some other location to suit its own convenience. Before the steamship line could have identified it for the purpose of removal, and, after that, before they could have exercised any control over it, the co-operation and assistance of the defendant was necessary" (Record, p. 117).

It may be noted that in all of the cases cited the formal acts of transfer had not been attended to. In the

Pratt case the way-bill had not been consulted to obtain destination of the goods, and to collect the charges upon the goods. Thus in the Merriam case no receipt was given for the box delivered upon the dock; in the Converse case the way-bill had not been delivered and checked, as also was the case in the Pratt case; in the Smyser case the bales of cotton had not been counted nor bills of lading issued, as was customary, yet in all these cases the fact of delivery was held not to be dependent upon these formal acts.

Undue stress seems to be laid both by the trial Court and by the Circuit Court of Appeals upon these immaterial formal matters. Thus the trial Court in directing a verdict thus seeks to distinguish this case from Pratt vs. Railway Company and Converse vs. Transportation Company:

"The dock was the dock of the Texas and Pacific Railway Company. They deposited the goods upon the dock and sent the transfer slip, and all these various documents passed. What was the condition of the goods put upon the dock from that time on, so far as the steamship company was concerned? As I understand the testimony, the steamship company had no business to come there to move the goods from one part of the dock to another, nor to change the way they were placed upon the dock. They could come there during business hours and ask to have their goods pointed out to them; could then by their employees during business hours, at a time when the railway company was willing that they should come, move the goods from the particular location to the steamer, giving a receipt for them. But aside from that I do not understand that they had any control over the goods. They certainly had no control over the dock as a dock. They had nothing to do as to determining whereabouts on the dock these goods were to be placed. If they were placed by post 29 when they arrived on Monday, they might be moved by the railroad company to post 43 on Tuesday, without the permission of the steamship company at all;

without consulting the steamship company. *Per contra*, the steamship company could not move one bale on the dock from where it had been put to any other place on the dock. It could only move the goods from the dock to the ship and then with the permission of the railroad company " (Record, pp. 89, 90).

This is quoted with approval in the opinion of the Judge delivering the decision of the Circuit Court of Appeals (Record, pp. 114, 115).

If these conditions are material as distinguishing this case from the case of Pratt vs. Railway Company, then it is material to ascertain just how far they are sustained by the testimony in the case. We think an examination of the testimony upon this point will show that it is a very imperfect statement of the facts as presented in the record.

The testimony upon the subject is given by two witnesses, A. L. Wilkinson (Record, pp. 75–80), and C. G. Miller (Record, pp. 31–39). Mr. Wilkinson was the employee of the defendant specially in charge of the wharf at Westwego for some time prior to the fire of November 12, and presumably better informed than any one else upon this subject. His testimony upon the subject is very definite, and is as follows:

" We had a particular shed for cotton destined for a particular place. We tried to divide it off so that we could berth a vessel, and when she came there to get the cotton she could take it from the most convenient point, saving trucking a long way. As to different points for different destinations, we had the east end No. 2 Shed, or down river end, full of Bremen cotton—had been there quite a while—and we had Havre and Genoa toward the middle of the two sheds, and the bulk of Liverpool in No. 2 Shed, some of it in No. 1. After unloading cotton in this way, it was left there for the ship to come and get it. When a ship came to get the cotton as a rule generally the NewOrleans office sent up a list of the cotton that the ship was to take; sent it up to our office. Then

when the ship berthed, the purser or whoever was assigned to the cargo, would take the cargo from the wharf, would come in, we would locate the lots of cotton and go there with him and count them as they stood in the sheds, he would O. K. it and then the longshoremen would break down the cotton, take the trucks to the river front and from that into the screw, and put it into the ship. These longshoremen were in the employ of the stevedore who loaded the ship and the screw men also. What I have described was the regular method of dealing with Elder Dempster & Co. and the other steamship companies; that is the regular routine of the work. It was during the time I was there.

"By the Court:

"Q. When the ship's purser went there, he went there with some of your clerks? A. Yes, sir; just to count them.

"Q. And when the ship's representative was there, not only the ship's representative was there, but your representative was there? A. Yes, sir.

"Cross-examination by Mr. Cleveland:

"Our representative showed the ship's representative where the cotton was. He had no location; we had to show it.

"Q. Was the wharf in the exclusive possession of the railroad company as far as you know? A. It was the general wharf for any ship that wanted to come and get cotton.

"Q. But the railway employes were the persons on the dock? A. We employed the men on the dock. When anybody came there on the deck of the dock it was generally understood that they had permission of the railroad company. They have landed there without permission of the railroad company, I suppose."

On further cross-examination the witness says:

"When a ship arrived at Westwego and the purser or the mate came on the dock, he would come to the office in regard to the delivery of the cotton to be shipped. I mean in my office, and the cotton was pointed out to him. I or some of my employees went around to the different points and pointed out the cotton. I did not necessarily receive any paper from the ship or the ship's officers. They would come and ask for the cotton. They would likely have the paper

downtown, unless we got a message over the 'phone to give them any cotton they wanted. I got the mate's receipt for them before they left the wharf. I never know of a bale of cotton leaving that wharf without a mate's receipt being given for it, except it was an oversight. I received messages over the 'phone to deliver cotton. The messages came from the New Orleans office and also from the steamship agent, to give the ship what it could take, or not to give her certain lots; that she could not take it; her space was engaged elsewhere. As a rule my orders came from the New Orleans office. I worked under the New Orleans office.

"By the Third Juror:

"Q. I want to know, after the cotton had been delivered off the cars on the dock, who paid the expenses of handling it up to and including the time it was given to the ship? A. We paid the expenses of the cotton to put it on the dock on to the wharves.

"Q. From the time it was delivered on to the dock from the car, who paid the expenses up to and including its delivery to the ship? A. What do you mean by delivery to the ship—taken aboard of the ship?

"Q. Handing to them? A. The ship paid for taking it out of the shed. We were not even allowed to put in a man to help them without they paid 50 cents an hour. We only paid fifteen."

Record, pp. 77, 78, 79, 80.

Mr. Miller's testimony is less definite, for the simple reason that as agent of the defendant in New Orleans he was only occasionally at the dock at Westwego. He says (Record, p. 49):

"Upon the arrival of the vessel at the dock the employees of the railway company at Wetswego, in company with some one of the ship's employees—the mate, probably—would go around and count the various lots of cotton that were there, and the mate would give us what is termed a 'mate's receipt' for that cotton before loading it on the vessel.

"Q. At or shortly prior to the arrival of the steamship the cotton designed for that steamship would be brought out on the dock by the railroad employees, would it not? A. Not necessarily; that would depend where the cotton was, and in a number of instances the mate of the steamer would receipt to us for

it, and the steamship labor would truck the cotton from where we had it on the dock to the vessel."

Also on page 50:

"After the receipt from the steamship company of these transfer slips with marks of lots of cotton upon them, if it should be necessary to get the cotton out, that would be attended to by some of the railway employees at Westwego, as to locating the cotton and getting it out. It was not necessary to get it out at all times; it was on the wharf. It was all over the wharf; it was usually stored inside of the railway track toward the land. I do not know that I issued any specific order to any one in respect to getting out that cotton. It was understood we would get out cotton when necessary to do it. By getting out cotton I mean trucking it from where it was originally stored on the wharf out in front, or near enough in front to enable the steamship people to get it out without having to go around other piles of cotton. When that was done at all, it was usually done after the receipt of the transfer slip from the steamship company. Whether it was done at all, depended on the location of the cotton on the wharf. In some instances it was done and in some instances it was not done.

"Q. Do you mean that before the receipt of the transfer slip from the steamship company the cotton that was destined for a steamer was put between the wharf and the river?

"A. No, sir, not necessarily. I simply mean that if cotton which Elder, Dempster & Co., for instance, sent a steamer there to get, was where they could get at that cotton, and if there was no obstruction of any consequence between where this cotton was stored that they went there to get and the ship's side, in that case we had nothing to do in getting it out; they took it from where it was located; it was not necessarily gotten out by the employees of the railway company in the majority of instances after the receipt of the transfer slips from the steamship company" (Record, p. 51).

This is all the testimony on the subject and scarcely justifies the conclusion of the trial Court and of the Court of Appeals that the steamship company could only come there at designated times and under per-

mission of the railway company, and when it came that it always required further acts and conduct on the part of the defendant railway company before this cotton could be taken possession of and put on shipboard by the steamship company. The acts of pointing out cotton were simply the identification of the particular lots which the steamship company, exercising its discretion of selecting from among all of the lots of cotton on the dock, selected for the particular ship, and were of the same character precisely as the acts of the agent of the Michigan Central in the Pratt case, calling upon the checking clerk of the Grand Trunk Railway Company and getting the marks of the goods, destination, charges, &c., prior to reshipping the goods in all cases ; or as in the Converse case, of calling upon the Transportation Company's clerk and the Transportation Company's clerk pointing out the goods, checking the goods by the way-bill and practically receipting formally for the goods. These acts, while proper for an orderly method of transaction of business as between the steamship company and the railway company, ought not to control the liabilities of these parties in view of the express understanding between them that the wharf at Westwego was to be for the purposes of cotton shipment, the place of receipt by the Elder Dempster Company steamship line, of cotton which the Texas and Pacific Railway Company would move to that point, and would unload for them and which they would call for and receive at such times as they saw fit. The permission of the railway company was embodied in the original general contract, and made the wharf for the purposes of these shipments the wharf of Elder, Dempster & Company.

Great stress is put also by the trial Court and also

by the Circuit Court of Appeals upon the fact that all the employees on the dock were the employees of the railway company. This is true in a sense, and in another sense it is not true. All the employees employed in unloading cars and placing the cotton upon the dock in the places designated by the checking clerks were employees of the railroad company; but all the employees who came there for the purpose of loading cotton from the wharf to the ship, as Mr. Wilkinson testifies, were the employees of the steamship line, and when on the dock, so far as appears, they had full control for all purposes necessary to gain the object for which they were there; to wit, the taking away of cotton from the wharf and placing it aboard the vessel.

Other Cases Illustrating the Principle of Pratt vs. Railway Co.

The principle of law which we contend underlies Pratt vs. The Railway Co., and which was thus misconceived by the Court upon the trial of this case is very clearly set forth in other authorities by the State and Federal judiciary.

Thus where a railroad company erects a platform for the purpose of shipping cotton and its course of business is such as to induce parties to store cotton on it for shipment by next freight train, and a party does so store it there for shipment, and the train passes and neglects to put it on, and it is destroyed during the delay by fire caught from the sparks from the company's engines, the company is liable for the loss, upon the theory that it has been received by it, and is in its custody and control (Meyer vs. Vicksburgh Railroad Company, 41 Louisiana Ann., 639).

The case of Montgomery & Eufaula Ry. Co. vs. Kolb, 73 Ala., 396, is a clear case showing that a carrier may be responsible for freight delivered although in direct disobedience of its regulations for the receipt of freight. In this case the superintendent of the defendant had issued instructions for the conduct of its business, requiring all cotton to be delivered accompanied with instructions as to marks and shipper and no receipt to be issued for cotton until the cotton was upon the platform of the company, and accompanied with proper shipping directions. This cotton was delivered in the yard without shipping directions and upon evidence that such a course of business was followed at this particular station and much of the cotton received there was received in the same way, the company was held responsible for this cotton, although no notice of the deposit of the cotton had been given to the defendant. The opinion quotes with approval Hutchinson on Carriers, Secs. 90 and 91 (quoted *ante*, p. 24), as to what constitutes delivery to a carrier.

Note that in this case express directions had been given to the agent as to the manner in which cotton should be received. These directions had been disregarded in this instance, and the sole basis upon which the company's liability was determined was that it had been the custom of the agent at the station to allow goods to be deposited alongside of the platform from time to time, and that these goods were deposited in that manner, and without notice to the agent of the railroad company. The opinion cites with approval Section 91 of Hutchinson on Common Carriers, stating the rule as to the liability of the carrier upon freight,

under circumstances such as obtained in 38 Illinois, 20 Conn., and 33 Conn.

In Green vs. the Railroad, 38 Iowa, 100, the plaintiff sent her trunk properly labeled with her name and destination to the depot of the company during business hours in the evening, intending to take passage on its train the next morning, and the company's employees being at supper, the drayman put the trunk down in the waiting room without notice to any of them, as he had often done before, which was proven to have been the custom with passengers intending to leave by the morning trains. It was held that when the trunk was thus deposited it was at the risk of the company, and it having been burned during the night, the company was held liable :

"That the delivery may be made at the proper time of receiving such baggage under the express assent or authority of the carrier, without notice to its employes, will not, we presume, be disputed," said the Court. "It is equally clear upon principle that this assent may be presumed from the course of business or the custom of the carrier. Upon evidence of this character contracts based upon business transactions are constantly established. * * * There was evidence tending to show a course of business on the part of the defendant, a custom to receive baggage left at the station house, as in this case, without notice to defendant's servants. Upon evidence of this character it was proper that the facts should have been left to the determination of the jury whether there had been a delivery of the property within the rules above announced; whether a course of business, a custom, had been established to the effect that a delivery of baggage at the station house, without notice, was regarded by defendant as a delivery to its servants, and whether plaintiff's trunk was received under this custom."

See, also, Green vs. The Railroad, 41 Iowa, 410.

The rule as between the shipper and carrier is thus

clearly stated by Hutchinson on Carriers, 2d Ed., Sec. 99:

"When the owner of the goods has done all in his power and all that he is required to do by his understanding with the carrier or the usage of the business to further shipment, and it becomes then the duty of the carrier to do whatever else is necessary to put them *in transitu*, the delivery and acceptance will be considered as complete from the time the carrier is informed that they are ready for him. As, where it was the course of business for a railroad company, when required to do so, to send its cars to a sidetrack at the place of shipment to receive cotton for transportation, and for the shipper there to load upon them the freight and make out a manifest and leave it with the agent of the company, who then had the bales counted, signed bills of lading and sent locomotives to remove the cars thus loaded and place them in the train destined to the point to which the shipments were to be made, it was held that the delivery was complete as soon as the cotton was put upon the company's cars in this manner by the shipper and the company's agent informed of the fact."

Hutchinson on Carriers, Sec. 99, citing Ill. Cen. R. R. vs. Smyser, 38 Ill., 354.

This principle is quite well illustrated in the case of Coyle vs. Great Western Railroad Company, 47 Barb., 152. In this case the plaintiff, a brewing company, was in the habit of delivering goods to the defendant, the railroad company, at East Albany, and was in the habit of sending receipts with the last load of the particular shipment or shipments at all times prior to this occasion, and before the shipment in each case the goods were receipted for and entered in the books of the railroad company in accordance with the shipping order and receipt which would be sent with the last load. *On the occasion in question the goods were sent, but were not thus receipted for, and were not tallied by the receiving clerk of the railroad company, and it does*

not appear that the receiving clerk had knowledge of the presence of these goods at the station. The shipment was not entirely complete, and in the night intervening before the completion of the shipment the goods were burned in the warehouse; notwithstanding the absence of the receipt and the incompleteness of the shipment, the defendant was held liable. MILLER, J., says:

"The delivery was complete, so far as the plaintiff was concerned, as he has nothing more to do. The taking of the receipt for the property was not essential to complete the delivery. It was for the plaintiff's benefit, and the defendant cannot complain because he thus failed to protect himself by a written acknowledgment of the delivery instead of relying upon verbal proof of that fact should it be required, nor do I think that anything remained to be done by the consignee or his agent after the delivery of the property to the railroad company before they were ready to transport it. The counting, checking and entering the property upon the books of the company for shipment were matters connected with the course of business of the defendant which were for the benefit and protection of the railroad company, which could not in any way affect the delivery. Suppose these had all been entirely neglected and the goods had been shipped before they were sealed and had been lost or destroyed, would the defendant have been exonerated? Certainly not, for the very apparent reason that these were acts of the defendant and the plaintiff could not be made to suffer by their omission."

The same principle is applied in Insurance Co. vs. Railroad Co., 144 N. Y., 200, where it is held that the liability of the railroad company as a carrier began notwithstanding it was the duty of the shipper to load the freight into the cars when they were furnished by the carrier. The principle upon which the decision goes is that the liability of the common carrier begins when the goods are delivered to him at the place ap-

pointed, or provided for their reception in a fit and proper condition ready for immediate transportation. The goods in this case were hay, which was unloaded in bales at the defendant's freight house at Cape Vincent, but where the shipper was to load it into the defendant's cars. The cars had not yet been furnished,and the claim of the defendant was that its responsibility as a common carrier had not attached to it at the time of the fire, and could not until the shipper had completed the work of loading. Upon this question EARL, J., says (205):

"There is no doubt that it is the duty, generally, of a railroad company to load the freight delivered to it for transportation into its cars, and that it cannor generally devolve this duty by any regulation upon the shipper; and that it cannot legally, as a condition of transportation generally, exact from the shipper a contract to place the freight into its cars. But we know from our own observation that as to hay, lumber, sawlogs, and other bulky freight, the shipper usually loads the freight into the cars. We need not, however, now decide whether a railroad company can, as to such bulky freight, make a regulation that the shipper shall load it, because here the shippers acquiesced in the regulation and undertook the duty of loading. *But we do not think that the fact that the shipper undertakes to load the freight into the cars necessarily postpones the time when the railroad company takes on the character of a common carrier.* The rule as to the responsibility of the carrier is laid down in varying phraseology in a variety of cases, as follows: To render a common carrier liable for goods to be carried by him, the fact that the goods were actually delivered to him or to some person authorized to act in his behalf, must be established. His liability attaches only from the time he accepts the goods to be carried. To complete the delivery of goods to the carrier it is essential that the property be placed in a position to be cared for, and under the control of the carrier or his agent, with his knowledge and consent. *The liability of a railroad company as a common carrier of goods delivered to it attaches only when the*

duty of immediate transportation arises. So long as the shipment is delayed for further orders as to destination of the goods, or for the convenience of the owners, the liability of the company is that of warehousemen. The liability of a common carrier for goods received by him begins as soon as they are delivered to him, his agents, or servants, at the place appointed or provided for their reception when they are in a fit and proper condition and ready for immediate transportation. If a common carrier receives goods into his own warehouse for the accommodation of himself and his customers, so that the deposit there is a mere accessory to the carriage and for the purpose of facilitating it, his liability as a carrier will commence with the receipt of the goods. But on the contrary, if the goods when so deposited are not ready for immediate transportation, and the carrier cannot make arrangements for their carriage to the place of destination until something further is done or some further direction is given or communication made concerning them by the owner, or consignor, the deposit must be considered to be in the meantime for his convenience and accommodation, and the receiver until some change takes place will be responsible only as a warehouseman."

The Rule as Between Connecting Carriers Similar to that Between Shipper and Carrier.

The relation between connecting carriers is substantially the same as that between shipper and carrier (Railroad Co. vs. Railroad Co., 82 Kentucky, 541). The test of delivery from the initial carrier to the connecting carrier should be the same as the delivery by a shipper to the carrier. In a case in its facts substantially identical with the case at bar the principle we contend for here was applied by the Court of Appeals of New York (Insurance Co. vs. Wheeler, 49 N. Y., 616). In this case the action was brought to recover the amount of insurance paid by

the plaintiff upon a quantity of flour shipped at Milwaukee for Boston, and alleged to have been destroyed by fire at Ogdensburgh, while in possession of defendants, as common carriers. The flour was shipped upon one of the boats of the Northern Transportation Company, which company ran a line of propellers from Milwaukee to Ogdensburgh, where it connected with the Northern Central Railroad for Boston. This road was run and operated by the defendants; the railroad and propeller line ran in connection with the defendant's railway under a *pro rata* agreement as to freight. The contract of shipment was dated at Milwaukee, July 12, 1864, and was as follows:

"Shipped in good order and well-conditioned by A. "J. Hale, as agent and forwarder, for account and risk "of whom it may concern, on board the propeller "'City of New York' (C. J. Chadwick, Master), now ly- "ing in the port of Milwaukee, and bound for Ogdens- "burgh, the following articles, marked and numbered "as per margin, and which are to be delivered in like "good order and condition (the leakage of oils, molas- "ses, liquors and other liquids, and the dangers and "accidents of navigation, fire and collision excepted), "without delay unto consignees at Ogdensburgh, paying "freight and charges." In the margin was "H. & W. "Chickering, Boston, Care George A. Eddy, agent, "Ogdensburgh."

The transportation company had an agreement with the defendants, who were in possession of and operating the railroad running east from Ogdensburgh, to transport over their lines through freight in connection, and divide the compensation as provided by the agreement. The transportation company contracted for the carriage of the flour to Ogdensburgh only, but the freight for the entire carriage was $1.10 per barrel. This was divided between the transportation company and the defendant.

An examination of the original record of this case in Cases in Court of Appeals, Abb. Ann., 1872-73, Vol. 187, of the Law Institute Library, shows almost an exact counterpart of the case at bar, upon the facts. A very concise statement of the facts of the case is contained in the report of the Referee, A. B. James. It is as follows:

There was an arrangement between the said Northern Transportation Company and defendants that all freight brought by cars going west, and all freight brought by propellers going east was to be handled and transferred by the former at the price of 30 cents per ton, each paying half, and that such handling consisted in taking the freight from the car and putting it on the wharf ready for the boat when prepared to receive it, and from the boat and putting it into the warehouse ready for the cars when sent to receive it; that the warehouse used was the property of said defendants as trustees, rented to the Northern Transportation Company; that the mode of business on the receipt of property by the N. T. Co., after having it transferred from the boat to the warehouse, was to notify the defendants of the fact, giving the specifications of the property, its destination, quantity, rate and amount of back charges, *and, when the cars were sent for it, to tally it out and deliver it to the employees of the defendant, by whom it was received and placed upon the cars for transportation;* that defendants were duly notified of the arrival of this flour and its destination, but in consequence of the deficiency of cars to do the business thus presented, occasioned by some of their cars having been impressed for Government use, they were, without fault or negligence, unable to and did not send any cars to receive said flour, and said

flour never came to the possession of defendants as carriers or otherwise.

The testimony of the various witnesses brings the case still closer to the facts of the case at bar. Thus Dennis P. Gardner testified that he was the tally clerk to tally freight off of propellers and to the railroad; he had charge of the crew who piled the freight into the sheds or warehouses and locked the warehouse at night, keeping the key in the office of the N. T. Co. The flour was in warehouse marked "No. 1;" he was in the employment of the N. T. Co. and had headquarters in its office; when he did not have the keys, left them in the office of the Northern Transportation Co.; when the freight was landed no one in the employ of the railroad was there to take account of it; the railroad company first took note of property when loaded on to cars; no one that I know from the railroad had any knowledge of any property until it was loaded and when freight was loaded into the cars the tally clerk of the railroad first took account of the property.

The testimony of Philo Chamberlin was as to the arrangement respecting the use of the wharf; and D. W. C. Brown, assistant superintendent of the Northern Road, testified that the final conversation between Chamberlin, Eddy and himself was that, "We (the "Railroad Company) would pay them 15 cents per ton "to handle and deliver to our cars," which he testified later was accepted; then the warehouse, he testified, was rented by the N. T. Co.; and on cross-examination he testified to having an account with the N. T. Co. for rent and for the 15 cents per ton for handling the freight.

Julius Beahse, tally clerk for the railroad company,

testified that he received freight from the N. T. Co. and saw it properly loaded, too, the whole of it; he took account of the freight from the order sent in from the N. T. Co., copied from the order into the tally-book, then went to the warehouse and got the goods; that Gardner had men to handle the flour: "Gardner "kept tally of the flour as well as I did; the men got "their pay in the N. T. Co.'s office. Gardner or some "of the clerks of the N. T. Co. had the key of the "warehouse."

Gardner, recalled, also testified that "No one tallied "the freight unloaded from the propellers until we "loaded it into the cars;" that he did not always tally; that he sometimes took Beahse's tally.

The Referee found (as did the trial court in the case at bar) that the flour had never come into the possession of the defendant, and that it never entered upon any duty or duties as carrier in relation to it, and was therefore not liable for its loss.

This conclusion was reversed by the General Term, which conclusion was affirmed in the Court of Appeals.

The question presented in the case was precisely the same as though in the case at bar Elder, Dempster & Co. had been sued instead of the railway, and they had defended upon the ground of want of delivery of the cotton to them. The Court of Appeals, in considering the case upon the facts, say through Grover, J.:

"The further fact that the bargain for this service was made with Chamberlin by the Transportation Company was immaterial. The service performed by him was in the common business of both, and he was paid by each equally therefor, and must be considered in the employ of both. *The title to the warehouses was not material. They were used by both parties for the transaction of this business, and, the defendants owning both, to equalize the matter, rent for one was paid by*

the Transportation Company to the defendants, but both were used by the parties for the transaction of the business. It is the use of the warehouse that is to be looked at, and not the title in determining the question. I have looked outside of the findings for some of the facts, for the reason that the case is referred to in the findings for this purpose. What is said about the key being kept when out of the possession of an employee of Chamberlin in the office of the Transportation Company, by the witness, is not material, as there is no pretense but that property placed where this was, was taken and transported by the defendants at their pleasure. The case shows that notice of the arrival of this property and its destination was given by the Transportation Company to the defendants, by whom it was entered on their books for transportation. The flour remained in the warehouse for eight days after this, for the reason that the defendants had not cars for its transportation, when with the warehouse it was destroyed by an accidental fire. In *Coyle vs. The Western Railroad Corporation* (47 Barb., 152) it was held that placing barrels in the usual place of delivery to a forwarder for transportation, which were received by persons in its employ, a part with the knowledge of the agent, though not counted, tallied or receipted for, as had been usual between the parties, placed them in its possession as a common carrier. In *Converse vs. The Norwich Transportation Company* (33 Conn., 166) it was held that when a company engaged in the transportation of goods by water, in connection with a railroad company, for through rates, divided between them, and the usage was for the boats upon arrival to deposit such goods upon a covered wharf used in common, and for the railroad to take such goods from there for transportation, that a deposit by the boat, according to the usage was a delivery; and that the water line was thereby discharged from further responsibility. (see, also, *Mills vs. The Michigan Central Railroad*, 45 N. Y., 622.) In the present case the flour was not only deposited in the usual place, but notice was given to the defendants, who entered it upon their books. *From this time it must be held to have been in the possession of the defendants as common carriers.*"

In the case of Conkey vs. Milwaukee & St. Paul Railway Co. (31 Wis., 619), a leading case in support of the

continued liability of the first carrier, DIXON., C. J., giving the opinion of the Court, very clearly states (notwithstanding the initial carrier was held liable upon the facts of that case), that in a case presenting facts similar to the case at bar, he would have treated the goods as having been delivered by the first to the second or succeeding carrier. Thus he says referring to the decision in Wood vs. Railway Co., 27 Wisconsin, 541 *(post* page 79.*)* (p. 630):

"That usage, now become universal, or very nearly so, is for the railway company receiving the goods destined for a place beyond the terminus of its route to transport them over its own road and then deliver them to the next company or carrier in the line of transit, collecting from the latter its own charges for freight and transportation, whereupon the latter becomes invested with a lien upon the goods for the charges so advanced in addition to his rates or charges for the transportation and delivery to the next succeeding carrier, who, in turn, advances the charges of the two that have preceded, and thus the process continues and is repeated until the goods have reached their place of destination and are in the hands of the last carrier, ready for delivery to the consignee or owner, subject to payment to such carrier of the accumulated charges of all the preceding carriers over whose routes they have been transported.

"Now, it was upon this well-known custom and usage, amounting as it does to an implied contract or promise on the part of each succeeding carrier to pay back charges and receive and carry forward the goods brought to it by the preceding one, that I relied as constituting the true ground of action or liability against the succeeding carrier, in case he unreasonably failed to receive and carry forward the goods according to his implied contract or obligation, and as he had held himself out as ready and willing and promising to do. That contract or obligation, I then thought and still think, created a liability on his part co-extensive with and similar in nature to his liability as a common carrier, in case he neglected or refused, in proper time and according to the usual course of business, to receive the goods, and they were afterwards, and before

coming to his possession, lost or destroyed. *I then looked upon his liability, and still do, as being in extent the same as if the loss or destruction had been of the goods in his custody and possession as a common carrier. It was to my mind like the case of goods delivered to a carrier for transportation and which were destroyed before the transit commenced. By the law of common carriers, their liability is fixed on receipt of the goods, and if they are lost in the warehouse of the carrier or elsewhere before the carriage commences, the carrier must respond, unless the loss was caused by a force superior to and beyond human agency and foresight, or by the public enemy, the onus of showing which is upon the carrier (Blossom vs. Griffin, 13 N. Y., 569; Ladue vs. Griffith, 25 N. Y., 364). I regarded the goods when separated and set apart in the accustomed place in the warehouse, and ready for delivery, by the preceding carrier, and after a reasonable time had elapsed for the succeeding one to receive them, and when, in the due course of business, he should have done so, as being pro hac vice, if need be, in the warehouse of the latter awaiting transportation by him, or, if necessary for the purpose of the remedy, constructively in his possession as a common carrier.*

"Such were the views which I then entertained, and I have as yet discovered no good reason for changing them. I then thought and still think, that the loss, if possible, should be made to fall on the carrier in fault, or him who appeared most so, and it was for this reason I assented to the rule that the last carrier should be held responsible as such, only until a reasonable time had elapsed for the next carrier to receive the goods, and not after that time."

The Foregoing Principles Applied to this Case.

Applying the principles of these cases to the case at bar, it seems impossible to arrive at any other conclusion than that the cotton which, from October 22 to November 4, was deposited upon the wharf at Westwego, had completed its transportation from Bonham

to New Orleans; and the fact that the cotton was from the moment of deposit upon the wharf awaiting the pleasure of Elder, Dempster & Co. to send their ships and take it away; and the further fact that this dock was the agreed place for delivery of this kind of goods to Elder, Dempster & Co.; and that Elder, Dempster & Co. had notice of the presence of this cotton upon this dock, had received the transfers of the cotton, and had returned them, bring the case at bar, as we insist, within the precise principle of the case of Pratt vs. The Railway Company, cited *ante*.

The sole distinction which the trial Court sought to make between the case at bar and Pratt vs. The Railway Company, namely, that the title to the dock was in the Texas and Pacific Railway Company, is held, in Insurance Company vs. Wheeler, to be wholly immaterial, as indeed it must be when carefully considered. It was, as DIXON, C. J., says, *pro hac vice*, the dock of Elder, Dempster & Co. for the purposes of receiving freight by them. By their agreement with the Texas and Pacific Railway Company, and the use which they had made of it prior thereto they had made it, for the purposes of delivering cotton shipped under such contracts, their dock, and as GROVER, J., says, in Insurance Co. vs. Wheeler, it was the use that was the determining factor and not the title in the dock or the wharf; nor does the further fact which is stated in the direction to the jury, that the dock was in the general control of the employees of the Texas and Pacific Railway Company, modify the rule in any way. In Insurance Co. vs. Wheeler, the warehouse at Ogdensburg was in the general control of the employees of the Transportation Company, who kept the same locked, and kept the keys

in that company's office, and yet the defendant railway company was held liable for flour in the warehouse.

For the purposes of shipments by Elder, Dempster & Co., it was in the control of their employees, for the testimony is that they could go there at their pleasure and take possession of this freight without any hindrance or action on the part of the Texas and Pacific Railway Company, and control the dock to the extent that was necessary to enable them to load the cotton on board their ship. That is to say, the agreement between the parties being that this was the point for reception of freight by Elder, Dempster & Company, common carriers, a part of that contract was the control of that dock by Elder, Dempster & Company, so far as the same was necessary for the reception of such freight, and its loading upon their vessels, and the course of business clearly demonstrates that it was so understood and acted upon by the parties.

The further fact upon which the Court relies that this cotton was counted, checked and a receipt given therefor at the time when Elder, Dempster & Co. came for it, under the principle as announced in 38 Illinois, Converse vs. The Railroad Co., and Pratt vs. The Railway Co., should have no controlling force, and none is given in those cases to these mere incidental circumstances. In those cases, as strongly as in this, was it urged upon the Court that delivery was dependent upon such circumstances, but the Court say that delivery is not made dependent upon the transmission of a paper from one person to another, the counting of the goods and the tallying of them; but the fundamental fact that the carrier had designated a particular place where it would receive freight, and that the de-

posit of the freight at those places (without notice in most of the cases, but clearly when there was notice, as in the case of *Insurance Co. vs. Wheeler*), brought the goods within the possession of the carrier, who had made the designation, and that the giving of these papers, or the withholding of them, was a matter that concerned the convenience of the parties, their security as between themselves, and an orderly course of business and nothing more.

The Circuit Court of Appeals considered that the case at bar was within the principle decided by Court of Appeals of New York in Goold vs. Chapin, 20 N. Y., 259. There is a clear distinction between the facts of that case and the case at bar. In that case the defendants were common carriers from New York to Albany, and carried the goods to Albany and there unloaded them from the vessel to a float belonging to them, which belonged solely to them, and was used solely by them to deliver to canal boats. While there they made one or more requests of the connecting carrier to stop and take the goods from the float, which was not done, and a fire occurred, and they were consumed. It was held that there was no delivery to the next carrier, and that the first carrier was still responsible. This is treated by the Circuit Court of Appeals and by the defendants in error as being a case exactly similar to the case at bar.

The distinction between that case, and the case at bar on the facts is this : the float on which the goods were at the time of the fire was the first carrier's, and was used only for its purposes. The calling for them by the second carrier and taking off of the goods was merely an accommodation to the first carrier, in lieu of requiring it to take the goods to the second carrier's

wharf or warehouse. The float was in no sense whatever the float of the second carrier, not even in the use made of it. The second carrier had never, by contract or otherwise, agreed to it as a place of delivery of goods to it as a carrier. In the case at bar the express contract of Elder, Dempster & Co. was to make the Westwego wharf its place of delivery to it of the cotton, and this fact distinguishes widely the case at bar from the facts of the case of Goold vs. Chapin, and brings it exactly within the principle of the later case in the same Court of Insurance Co. vs. Wheeler, and also of Pratt vs. Railway Co. in this Court. This distinction was entirely overlooked by the Court of Appeals (Record, pp. 115, 117). The Court of Appeals even consider that the railway company defendant acquiesced in the delay as the first carrier was held to have done in the Goold vs. Chapin case. In the Goold vs. Chapin case the first carrier asked the second carrier to call for the goods as an accommodation to it. There being no obligation on the part of the second carrier to do this, the delay while the first carrier was waiting for compliance with its request was justly treated by the Court of Appeals as acquiescence in the delay.

But in the case at bar, the notice to Elder, Dempster & Co. was not simply a request. It was a demand to them to discharge an obligation and was put in that form. Thus, Mr. Pearsall, the superintendent of the defendant, testifies :

" The substance of the conversation was, first, the amount of the cotton on hand at Westwego for Elder, Dempster & Company which was stated, and the importance of moving the cotton was stated by me, and they were requested to make every effort to move it at

the earliest possible moment, *and to comply with their contract.* The exact words of their conversation I don't remember, by the sense of it was that their ships had met with great delays in New Orleans on account of the labor troubles that they had. At that time there was considerable trouble between the steamship agents and the cotton-screw men. They were on a strike—the screw men—*and they gave that as an excuse for not carrying out their contract of removing the cotton*" (Record, p. 81).

II.

The Court should have directed the jury that, under the undisputed facts in this case, the defendant held these goods, if at all, only as warehouseman and not as common carrier.

The question of the relation of an initial carrier to an intermediate or second carrier to whom goods must be delivered for transportation has been the subject of considerable discussion, and the authorities are by no means clear as to the rule to be adopted when the first carrier has completed the carriage and has brought them to a point where it is the duty of the second carrier to receive them, and the second carrier fails to perform his duty. Of course, if there has been a delivery to the second carrier, then the initial carrier's liability has ceased; but, prior to such delivery, what is the measure of the duty of the initial carrier; what is the extent of his obligations?

It seems clear that as to the second carrier the first carrier occupies a position of agent of the shipper, and

as a forwarder is bound to the exercise of reasonable diligence. Thus a recent writer defines the duty of a connecting carrier as follows:

"Reasonable diligence must be used to deliver or "tender goods by the carrier to the next succeeding "carrier" (Ray, Sec. 383, citing Burroughs vs. Railroad Co., 100 Mass., 26; Whitworth vs. Erie R. R. Co., 87 N. Y., 413; Dunham vs. B. & M. R. R. Co., 70 Me., 164; Regan vs. Grand Trunk Ry. Co., 61 N. H., 579).

Again, in the same authority, page 388:

"The carrier will be liable without a reasonably "diligent attempt to secure their forwarding, in ac- "cordance with the terms of shipment."

Initial Carriers Relation to Goods After Carriage.

THE AUTHORITIES REVIEWED.

Still, the question remains, What is the relation of the first carrier to the goods, assuming that it has discharged its duty of carriage and seeks to relieve itself of further liability? What must it do? It seems clear from the authorities that it is not sufficient simply to transport to the end of its line and place in a warehouse. But is it not sufficient when, as in this case, it has transported to the end of the line, and has tendered the goods, by giving notice of the deposit of the goods at the place where the connecting carrier is accustomed to receive freight, and thus made what is equivalent to a tender? Is this not sufficient to relieve it of its strict obligations as a carrier, and change its obligations to those of a mere forwarder, holding for the purpose of forwarding, as a mere warehouseman? Some authorities, we are aware, hold that there are

reasons why, in the course of a long carriage, the initial carrier should not be permitted to relieve itself of the obligations of a carrier. But we think that these authorities, when examined, will be found to show that in the particular cases decided, elements which should relieve the carrier from its strict common law liability were not present, and in almost all the cases there has been a suggested qualification of the rigid rule, in case certain facts existed, leaving the real question still to be decided, when it should arise upon facts like those in the case at bar.

Thus, in a case which is sometimes cited as a leading case upon the subject, Condon vs. The Railroad Company, 55 Mich., 218 (COOLEY, J., giving the opinion of the Court), the first carrier was held responsible upon facts showing that it had simply set the goods in its warehouse where the next carrier could get them, and where the next carrier was in the habit of getting them when it was ready to carry them, but where no notice was given to the second carrier, and nothing indicating that the first carrier wished to be relieved of them, and have the second carrier take away the goods, or the equivalent of tender. In the opinion there is a clear intimation as to what would have relieved the first carrier:

"Thus the shipper delivers his goods to a carrier who becomes an insurer for their safe transportation, and if the operations of one carrier cover a part only of the line of transit, and another is to receive the goods from him, the shipper has a right to understand that the liability of an insurer is upon some one during the whole period. The duty of the one is not discharged until it has been imposed upon the succeeding carrier, and this is not done until there is a delivery of the goods, *or at least such a notification to the succeeding carrier as, according to the course of business, is equivalent to a tender of delivery.* There is nothing in this

which is burdensome to the carrier, for this is the customary method in which the business is done, and the rule only requires that the customary method shall be pursued without unreasonable delay or neglect."

It may be noted that in this case, CAMPBELL, J., dissented, holding that, upon the facts of the case, showing the course of business as between the two companies, the next or succeeding carrier must have been held to a knowledge of the presence of these goods, and therefore that the defendant in this case could only be held subject to the liability of a warehouseman.

In Whitworth vs. The Erie R. R. Co. (87 N. Y., 413), the defendant was sued to recover the loss of 428 bales of cotton shipped at Memphis for Liverpool for transportation over defendant's road and destroyed by fire while in its freight house at Jersey City The bills of lading of the Erie and Pacific Dispatch and the Great Western Dispatch Company under which the cotton was shipped, contained provisions limiting the liability of the carriers, and among others, the provision that the companies and their connections should not be liable for loss or damage to the property by fire while in transit or while in deposit or place of transshipment or at depots or landings at any point of delivery. ANDREWS, C. J. (p. 417), says, respecting these bills of lading:

"The bills of lading were through contracts; that is, contracts for the carriage of the cotton from Memphis, the place of shipment, to Liverpool, England, at a fixed rate for the whole distance. The Oceanic Steam Navigation Company was a party to the bills of lading of the Erie & Pacific Dispatch, and the National Steamship Company to those of the Great Western Dispatch Company. But the undertakings of the respective carriers, although contained in a single instrument, were distinct and several and not joint. The bills of lading of the Erie & Pacific Dispatch declared

that its contract was executed and accomplished, and that its liability as common carrier should terminate on the delivery of the property to the Oceanic Steam Navigation Company, at the White Star Wharf, Jersey City, when the liability of the steamship company should commence and not before."

Again, at page 420, he says:

"The claim that there was an unreasonable detention of the cotton by the defendant after arrival and a failure of prompt delivery is not supported by the evidence. The general duty of an intermediate carrier of property involves the obligation on his part to deliver the property at the end of his route to the succeeding carrier within a reasonable time after its arrival (*Rawson vs. Holland*, 59 N. Y., 618). The cotton in question was accompanied by way-bills. The way-bills of the Erie & Pacific Dispatch contained the words, 'Consigned to Liverpool, England, care of Samuel Debow, New York.' Debow was the president and manager of the Erie & Pacific Dispatch. In like manner the way-bills of the Great Western Dispatch Company consigned the property to the care of its agent in New York. The uniform course of business between the defendant and the dispatch companies had been for the defendant, on arrival of property carried under bills of lading, to give notice to the proper agent named in the way-bill of such arrival. It then became the duty of the intermediate consignee or agent to obtain a permit from the steamship company for the delivery of the property to the steamship, and deliver the permit to the defendant; and, on such permit being obtained, it was the duty of the defendant's agent to deliver the property on lighters to the proper vessel. On arrival of the cotton in question, prompt notice was given by the defendant, in accordance with the custom. But, by reason either of the neglect of the agents of the dispatch companies to obtain the proper permits or the inability of the steamship companies to receive the property, the defendant was unable to get rid of the cotton, although its agents were persistently urging the agents of the dispatch companies to obtain the proper permits for its removal. *Upon these facts we are of opinion that the defendant fully discharges its duty, and is not chargeable with any negligence in respect to the detention of the cotton.* By the course of

business, the agents of the dispatch companies assumed the duty of obtaining the proper permits and the cotton, being consigned to their care, the defendant was justified in acting under their directions, and in accordance with the course of business they had established. The defendant made no express contract with the plaintiff to deliver alongside the vessel. Its immediate principals were the dispatch companies and it fully discharged its duty when it gave prompt notice of arrival and requested the agent to obtain the proper permits and held itself in readiness to deliver the cotton as soon as the permits were obtained. Assuming that there was an unreasonable detention of the cotton at the freight house of the defendant, it was not its fault and did not deprive the company of the benefit of the exemption in the bills of lading. The plaintiff must be deemed to have authorized the defendant to deal with the property according to the custom and under the direction of the dispatch companies, to whose care it was consigned at New York (see *Van Santvoord vs. St. John*, 6 Hili, 157 ; *Mills vs. The Michigan Central R. R. Co.*, 45 N. Y., 626).

In Railroad Co. vs. Manufacturing Co., 16 Wall., 318, it is very clearly intimated in the opinion of Mr. Justice DAVIS that the liability of the initial carrier is not in all cases and under all circumstances an absolute liability as such carrier, regardless of what the succeeding carrier may do, bus that its liability as carrier may be modified by circumstances, and if it has duly transported property and has made reasonable efforts in the way of tender to forward the property, its relation to the property must subsequently thereto be judged as that of warehouseman rather than that of carrier. This was a case of carriage over the Michigan Central Railroad destined for Stafford, Conn. ; the goods were carried to Detroit and while being held in the station at Detroit for a period of six days, were destroyed by an accidental fire. *There had been no attempt to deliver to the connecting carrier at Detroit,*

there being at the time a large accumulation of freight at Detroit awaiting propellers upon the lakes. Justice DAVIS says (p. 324) respecting the duty of the carrier :

" Different views have been entertained by different jurists of what the carrier is required to do when the transit is ended in order to terminate his liability, but there is not this difference of opinion in relation to the rule which is applicable while the property is in process of transportation from the place of its receipt to the place of its destination.

" In such cases it is the duty of the carrier, in the absence of any special contract, to carry safely to the end of his line and to deliver to the next carrier in the route beyond. This rule of liability is adopted generally by the courts in this country, although in England, at the present time, and in some of the States of the Union, the disposition is to treat the obligation of the carrier who first receives the goods as continuing throughout the entire route. It is unfortunate for the interests of commerce that there is any diversity of opinion on such a subject, especially in this country, but the rule that holds the carrier only liable to the extent of his own route and for the safe storage and delivery to the next carrier, is in itself so just and reasonable that we do not hesitate to give it our sanction. *Public polity, however, requires that the rule should be enforced, and will not allow the carrier to escape responsibility on storing the goods at the end of his route, without delivery or an attempt to deliver to the connecting carrier.* If there be a necessity for storage it will be considered a mere accessory to the transportation, and not as changing the nature of the bailment. *It is very clear that the simple deposit of the goods by the carrier in his depot, unaccompanied by any act indicating an intention to renounce the obligation of a carrier, will not change or modify even his liability. It may be that circumstances may arise after the goods have reached the depot which would justify the carrier in warehousing them,* but if he had reasonable grounds to anticipate the occurrence of these adverse circumstances when he received the goods, he cannot, by storing them, change his relation towards them.

" Testing the case in hand by these well-settled principles, it is apparent that the plaintiffs in error are

not relieved of their proper responsibility, unless through the provisions of their charter or by the terms of the receipt which was given when they received the wool. *They neither delivered nor offered to deliver the wool to the propeller company.* Nor did they do any act manifesting an intention to divest themselves of the character of carrier and assume that of forwarder."

Most of the cases cited in the books on the liability of connecting carriers are of this character, where the lodging in the warehouse or the terminus is a mere incident of the carriage, or it has been done without any notice to the next succeeding carrier or anything in the nature of a tender of the goods to such carrier. Such are the cases of Dispatch Co. vs. Kahn, 76 Ill., 520; Goold vs. Chapin, 20 N. Y., 266; McDonald vs. Western Railroad Company, 34 N. Y., 497; Ill. Centl. R. R. Co. vs. Mitchell, 68 Ill., 471; Mills vs. Mich. Centl. R. R. Co., 45 N. Y.; Ladue vs. Griffith, 25 N. Y., 364.

In McHenry vs. Railroad Co. (4 Herrington, Del., 448), the duty of a connecting carrier is thus stated by BOOTH, Ch. J.:

"But where he receives goods to be carried by him from one place to another, which is at the terminus of his route, thence to be forwarded by a distinct conveyance to another place, it is his duty, as soon as he arrives at the place to which he engaged to carry the goods, to deliver them to the carrier (if there to receive them) by whom they are to be conveyed to their place of final destination. If such carrier be not present or there be no agent to receive the goods, it is the duty of the former carrier to deposit them in a warehouse for the purpose of being forwarded. When he has done so he discharges himself from the custody of the goods as a common carrier and becomes in regard to them a mere warehouseman (Garside vs. Trent and Mersey Navigation Co., 4th Term, Rep., 581; *in re* Webb *et al*, 4 Taunt., 433; 4 Com. Law Rep., 159).

In Garside vs. Proprietors of the Trent and Mersey

Navigation Co. (4 Term Reports, 581), the declaration charged the defendants as common carriers for hire from Stourport to Manchester, and that the plaintiff delivered to the defendants four packages of hops to be carried from Stourport to Manchester, to be forwarded from thence to Stockport; that the defendant undertook this for certain hire and reward, and yet that the defendant did not forward the hops from Manchester to Stockport. At the trial it appeared that the goods directed to the plaintiff at Stockport were delivered to the defendants to be carried from Stourport to Manchester; that they arrived safely at Manchester on the 30th of September and were put into the defendant's warehouse, where that night, together with other goods, they were burned in an accidental fire before any carrier came from Stockport to whom they could be delivered. The course of business was when goods were sent from Stourport to go beyond Manchester, if any carrier was there, to receive them upon payment of carriage from Stourport to Manchester; if not the defendants put them in their warehouse till a carrier arrived to whom they could be delivered. The verdict was taken for the defendant, with liberty to the plaintiff to move to set it aside and enter up a verdict for him if the Court should be of the opinion that the defendants were answerable. The Court refused even a rule to show cause. Lord KENYON, Ch. J., said:

"If the defendants were considered merely as warehousemen, there would be no pretense to say that they were liable for such an accident as the present. The case of a carrier stands by itself upon peculiar grounds; he is held responsible as an insurer; and the reason given in the books (whether well or ill-founded is immaterial) is to prevent fraud. But I do not see how we can couple the character of the carrier with that of the warehouseman, in which case

the defendants are not liable here, they not having been guilty of laches."

BULLER, J., also observes :

" The keeping of the goods in the warehouse is not for the convenience of the carrier, but of the owner of the goods ; for when the voyage to Manchester is performed, it is the interest of the carrier to get rid of them directly ; and it was only because there was no person ready at Manchester to receive these goods that the defendants were obliged to keep them.

" Rule refused."

The rule is thus stated in Hutchinson on Carriers, Sec. 102*a*, 2d Ed. :

Duty of first carrier to effect delivery to succeeding carrier :

It is the duty of the first of two connecting carriers upon the arrival of the goods at the point of connection with the succeeding carrier, if he knows where and to whom they are to be delivered, to use reasonable diligence to deliver the goods to the succeeding carrier, and at all events to make a tender of delivery and to stand ready to deliver them in accordance with the tender.

Regan vs. Railway Co., 61 N. H., 579.
McKay vs. Railroad Co., 50 Hun., 563.
Insurance Co. vs. Railroad Co., 8 Baxt., 268.
Whitworth vs. Railroad Co., 87 N. Y., 413.
Rawson vs. Holland, 59 N. Y., 611.
Burroughs vs. Railroad Co., 100 Mass., 26.
Dunham vs. Railroad Co., 70 Me., 164.

Snow vs. Railway Co., 109 Ind., 422.

In Regan vs. The Railway Co., 61 N. H., 579, perishable goods had been shipped by defendant's railway to its terminus at Portland, whence they were to be shipped by boat to Boston. The goods reached Portland in due course on Saturday after the boat had gone. No boat ran on Sunday. On Monday the boat agent notified defendant's agent that on account of a

severe storm raging no boat would run that day, and that he did not know when it would run again, as it looked like a long storm. Defendant's agent, therefore, sent the goods on that day to Boston by railroad, but did not notify the consignee of the change. The train got off the track owing to the storm, and was delayed, so that when the goods reached Boston they were damaged. Said the Court:

"The defendant's undertaking was to carry the plaintiff's goods from Groveton to Portland and deliver them to the boat for transportation to the consignee at Boston. When they had carried the goods to the terminus of their line in Portland and had notified the agent of the boat line that they were ready to deliver the goods for further conveyance, they had done all that was required by the terms of their contract; and if the ordinary running of the boat had not been interrupted, they would have been relieved from further liability. *Gray vs. Jackson*, 51 N. H., 9; *Ins. Co. vs. Railroad*, 104 U. S., 146. By an unforseen event for which the defendants were not responsible, it was impossible to forward the goods by the conveyance specified. The failure of the boat to run as usual did not impose upon them the duty of transporting the goods from Portland to Boston. That duty they had never assumed and no change of circumstances could subject them to the extraordinary responsibility of carriers beyond the termination of their route. But, although they owed no duty of further transportation, the defendants were bound to the exercise of reasonable care and to so conduct in relation to the plaintiff's goods that he should suffer no unnecessary loss or damage. *Though no longer liable as common carriers, they were liable as depositaries and required to exercise ordinary care in the custody of the goods.* In cases of accident or emergency it sometimes happens, although the transit is at an end, that the duty is cast on the carrier of taking such reasonable care of the goods as a reasonable owner would take of his own goods. *Railway Co. vs. Swaffield*, L. R., 9 Ex., 132. And a carrier is bound to use all reasonable means such as a prudent owner being present would take to save the property from loss by natural causes. *Ed-*

wards Bail., sec. 598; *Peck vs. Weeks*, 34 Conn., 145; *American Express Co. vs. Smith*, 33 Ohio St., 511; *S. C.*, 31 Am. Rep., 561, and notes, 567; *Empire Transportation Co. vs. Wallace*, 68 Pa. St., 302; *N. & C. R. R. Co. vs. David*, 6 Heisk, 261. What constitutes such reasonable care and diligence is a question of fact to be determined with reference to all circumstances of the case. *Cass vs. B. & L. R. R.*, 14 Allen, 448, 450. The defendant's agent, learning that the boat would be prevented from running on account of the storm, and knowing the perishable character of the goods, forwarded them the same afternoon by the Eastern Railroad; and the Referee finds that in so doing he exercised due care and prudence, but that he was negligent in not notifying the consignee of the change of route. He also finds that such notice would not have avoided the loss and that the plaintiff suffered no injury by reason of the negligence of defendants' agent. Upon these facts the plaintiff's action cannot be maintained. After the termination of the defendants' liability as common carrier, they were answerable only for the injuries happening in consequence of their own negligence. They were not responsible for loss which they could not have prevented by the exercise of due care. Sh. & Red. Neg., Sec. 8."

In Wheeler on the Modern Law of Carriers, p. 282, the following is a statement of the law:

"It does not fall within the scope of this work to consider in detail the law as to when the liability of the first carrier ceases nor when he is liable for injuries occurring on the connecting line.

"In general, it may be said that, in order to discharge himself, he must make such a delivery to a connecting line as he should make if the place of consignment was on his own route, and when he has made such delivery his liability ceases. If he notify the next connecting carrier that he is ready to deliver the goods to him, and the latter, after a reasonable time, neglects to receive and to remove the goods from the custody of the first carrier, they may then be warehoused, and the liability of the first carrier as such will thereupon cease, and he will be liable as warehouseman only."

Citing

In Re Peterson, 21 Fed. Rep., 885.

Eaton vs. Newmark, 33 Fed. Rep., 891.
Reed vs. U. S. Ex. Co., 48 N. Y., 462.
Mills vs. Mich. Cent. R. R., 45 N. Y., 622.
Dunson vs. N. Y. Cent. R. R., 3 Lans. (N. Y.), 265.
Wahl vs. Holt, 26 Wisconsin, 703.
Mobile & Ohio R. R. Co. vs. Hopkins, 41 Ala., 486.
Lewis vs. Western R. R., 11 Metcalf (Mass.), 509.
Louisville & N. R. R. vs. Campbell, 7 Heisk. (Tenn.), 253.

In John B. Ayres vs. Western Railroad Corporation, 14 Blatch., 9, goods in course of transportation from West Springfield, Mass., to Cleveland, Ohio, were destroyed by fire in the depot of the Western Railroad Corporation at East Albany, New York. The receipt given at West Springfield recited that

"this contract and the responsibility of the parties hereto are limited and controlled by the rules and regulations printed upon the back of this receipt, it being also understood that this corporation assumes no liability beyond the end of its own line, and that so far as it acts as agent for other parties in the joint transit aforesaid, said parties are separately liable."

Upon the back of the receipt was also a condition that

"the company will not hold itself liable as common carrier for articles of freight after their arrival at the place of destination and unloading at the company's warehouse or depots."

Upon this clause the defendant relied for its defense to the action brought for the recovery of the value of the goods. The goods arrived at East Albany and were unloaded on the second of July, and on the fifth the warehouse took fire, and the goods were consumed

without fault on the part of the defendant. No notice of the arrival of the goods was given by the defendant, the Western Transportation Company, but it appeared that an agent of the latter, according to the usual course of business, had visited the warehouse of the defendant to look for goods prior to the 5th of July. Upon these facts WALLACE, J., says:

"Giving effect to the receipt delivered by the defendant as a special contract, which restricts the common law liability of the defendant as a carrier, and renders it liable only according to the conditions mentioned upon the face and back of the receipt, the defendant was liable as a carrier for the goods destroyed in its warehouse while in course of transportation. The goods were to be transported by the defendant to its depot for the purpose of delivery there to a second carrier in the course of transportation to the ultimate destination of the goods; and in such case the carrier is liable as a carrier while the goods are in his warehouse awaiting delivery to the second carrier, *unless it is absolved by notice after arrival to the second carrier* or by the terms of a special contract with the shipper."

Citing,

Condict vs. Grand Trunk Railway Co., 54 N. Y., 500.

Railroad Co. vs. Mfg. Co., 16 Wall., 318.

Mills vs. Mich. Cent. R. R. Co., 45 N. Y., 622.

McDonald vs. Western R. R. Corp., 34 N. Y., 497.

Rawson vs. Holland, 59 N. Y., 611.

In Wehmann vs. Minneapolis, St. P. & S. S. M. Ry. Co., 59 N. W. Rep., 546, was considered the case where flour was carried over defendant's line and at the end of the line was put in defendant's warehouse on the 21st of November, and remained there until November 29, when it was destroyed by fire. At the point where the warehouse was situated

(Gladstone), the line of the next carrier began, and there was no evidence on the trial that notice of the arrival of the flour at the terminus was given to the transportation company, or to the plaintiff. The Court, through GILFILLAN, C. J., after passing upon the question whether the liability of the defendant was to carry the goods the entire route, or simply over its own line, and then to deliver to a connecting carrier, says:

"*The liability of the defendant is to be determined as though its contract had been to carry to Gladstone and there deliver to any consignee.*

"There is no express evidence on the point but under the arrangement for a continuous line it is to be presumed that the transportation company had an agent at that point to whom the flour might have been delivered and to whom notice of its arrival might have been given, and that the defendant knew who that agent was. When the consignee resides at the place of destination or has an agent there authorized to receive the goods, and that is known to the carrier, the latter's liability as carrier does not end, and the liability become that of a warehouseman until the lapse after notice to such consignee or agent that the goods have arrived of a reasonable time to receive and remove them."

Effect of the words "in whose actual custody the cotton shall be" considered.

Upon the trial of the case the Court gave controlling force to the following language of the first paragraph of the bills of lading:

"In case of any loss, detriment or damage done to "or sustained by said cotton before its arrival and "delivery at its final destination, whereby any legal "liability is incurred by any carrier, that carrier alone "shall be held liable therefor in whose actual custody "the cotton shall be at the time of such damage, detri-"ment or loss" (Record, p. 88).

The Court of Appeals also in the concluding portion of the opinion seem to coincide in this view (Record, p. 117).

Under the first point of this brief respecting the delivery of this cotton, we have argued that the cotton involved in this suit had been actually delivered to the connecting carrier, the Elder, Dempster & Co. steamship line; that the wharf at Westwego was, to the extent necessary to carry out the provisions of contract 44 under which this cotton was shipped, the wharf of Elder, Dempster & Co., notwithstanding all other uses of the wharf, and the general control of it were in the defendant the Texas and Pacific Railway Co.

We think the authorities cited warrant the conclusion that, for the purposes of carriage, this cotton was, at the time of the fire, in the "actual custody" of Elder, Dempster & Co., and therefore the suggestions of the Court do not properly apply. But assuming for the purposes of this argument upon the question we are now considering, that the words of the bill of lading mean something more than was meant by "delivery" in the case of Pratt vs. Railway Company, or in the Connecticut cases of Converse and Merriam, or in the Smyser case from Illinois, and the Arkansas case, still the question remains if under the circumstances of this case the cotton was in the "actual custody" of the Texas and Pacific Railway Company, in what character did the Texas and Pacific Railway Company hold it? Was it as carrier, or was it as forwarding agent of the shipper, having discharged its primary duty of carrying to the end of its route, and then holding it for the purpose of forwarding as a warehouseman?

It may be observed that, even if the construction

of the words of the bill of lading which the Court adopted may be approved, still the conclusion at which the Court arrived in directing a verdict by no means necessarily, follows if the doctrines we are contending for under this head of our argument are correct. There are conditions in which, when the initial carrier has fully performed its part of the contract of carriage, it thereupon becomes relieved of the severe obligations of a carrier, and has substituted therefor the lighter obligations of a warehouseman. The authorities which have been cited justly the conclusion that upon the first carrier's performing his duty of carriage, and then tendering to the next carrier the goods, the utmost liability chargeable upon the first carrier thereafter is that of warehouseman. Therefore, although he may have the goods in his "*actual custody*," it does not follow that he thus holds them as a carrier if he has in fact complied with the conditions relieving himself of the responsibility of a carrier. (See Deming v. Norfolk & Western R. R. Co., cited *post*. p. 84).

Did not the defendant comply with these conditions in the case at bar? The fact is indisputable that it had completed the carriage, that it had carried this cotton to Westwego, unloaded it upon the wharf, the place agreed upon with the next carrier for its reception, and had given notice to the Elder, Dempster & Co. line of steamships of its presence there in a condition to be removed at the pleasure of Elder, Dempster & Company; that this was all that it could do in the way of shipment, and performance of its own contract of carriage; that it was then absolutely helpless without the co-operation of the steamship company to forward that cotton upon the route and lines which had been selected by the shipper, to wit—from Bonham to New Orleans by the Texas and Pacific Railway Company,

and from New Orleans to Liverpool by the Elder, Dempster & Co. line of steamships.

This being so, does it not follow that the Texas and Pacific Railway Company must be deemed in this matter to have held only the relations of warehouseman to this cotton, although it was in its actual custody, and that it held the cotton only as warehouseman notwithstanding it was upon its wharf, unless the iron-clad rule is to be established that a carrier taking goods for shipment beyond its own lines, and undertaking to carry only upon its own lines remains liable as carrier until the succeeding carrier, selected by the shipper, and which has contracted to carry them forward upon arrival, sees fit to receive them from it, or until, at its own risk and expense, it ships them by another carrier?

Inequity of Result of Decision.

The effect of the rule established by the Courts below in this case is unjust in the extreme. Look at the exact facts of the case. The defendant agreed with the shipper to carry his cotton to Westwego and then turn the cotton over to Elder Dempster & Co. Elder Dempster & Co. also agreed with the shipper to take the cotton at Westwego and carry it to Liverpool. These contracts were several and not in any sense joint. The defendant complies with its contract, so far as it can, carries the cotton, and the steamship company defaults upon its independent engagement. For such default, for which the defendant is no wise responsible, the defendant must account to the shipper. This is making the defendant the guarantor of Elder Dempster & Co. in reality, something certainly never contemplated in the bill of lading.

Effect of the Clause "Liberty to Ship by Another Steamship or Steamship Line."

It is of no importance that the bill of lading contains the clause "with liberty to ship by any other steamship or steamship line." This phrase was relied upon by the Court below to support the view that it was not in contemplation of the parties that the railroad company could relieve itself of its obligations as a common carrier when the goods had arrived at the end of its route, merely by giving notice to the succeeding carrier and without notifying the shipper. The Court said: "The very contingency of the failure, or neglect or refusal of the second carrier to accept the goods of the first carrier is provided for, because it is left optional *with the first carrier* to send them forward by any other steamship line than the Elder Dempster Steamship Company" (Record, p. 89). In this, as it seems to us, the learned Judge was clearly in error and overlooked the form of the contract of shipment. His language implies that it was the duty *of the railroad company*, if it wished to protect itself, to forward the goods by some other steamship line, and ignores the obligation, which was imposed upon the steamship company by the contract between it and the shipper contained in the Bill of Lading to receive the cotton upon its arrival at Westwego, and carry it from that point to Liverpool.

The bill of lading was not, as the Court assumed, a mere contract between the shipper and the railroad company. As we have already pointed out, it was two

separate contracts in one instrument, being on behalf of the steamship company, as well as on behalf of the railroad company. The shipper agreed that his goods were to go "from Bonham, Texas, to Liverpool, Eng-" land. Route: via New Orleans and Elder Demp-" ster Steamship Line." The agreement being on behalf of the steamship company and the railway company severally, and the steamship company as well as the railroad company had rights and obligations under it. It cannot, therefore, be said that in the event of the failure of the Elder Dempster line to receive the goods promptly the duty of providing other means of ocean transportation was thereby imposed upon the railroad company. This would make the contract what the Court in directing a verdict said it was not; a contract in which the railway company, defendants, was responsible for the carriage the entire distance from Bonham, Texas, to Liverpool, England. The clause was evidently inserted for the purpose of protecting, not the railroad, but the steamship company, against such a contingency as arose in the case of Marx against the National Steamship Company (22 Federal Reporter, 680).

Suppose in this case the cotton had been actually loaded by the Elder Dempster Company's line upon one of its own steamers, but thereafter it had been found impossible for some reason to continue the voyage to Liverpool, and the steamer had, either in the port of New Orleans or elsewhere, transferred its cargo to another vessel. It could hardly be doubted that in a suit to recover damages for the loss of the cotton upon such vessel, the Elder Dempster Company would have been able to avail itself, in defense, of the above-quoted clause, whereby the shipper agrees that

any other steamship, or steamship line, may be substituted between New Orleans and Liverpool. If, therefore, the steamship company has rights under the contract, it must have correlative duties. The duty of providing other means of transportation between Westwego and Liverpool under the contract for the cotton involved in this suit rested upon the steamship company. It did not rest upon the railroad company to ship by any other line of steamers. The shipper had contracted with the Elder Dempster & Co. line to carry his cotton from New Orleans to Liverpool, and had given them the privilege of performing their contract with him by other ships or steamship lines. The defendant's duty was performed when the cotton was carried by it to the end of its own line and then turned over to next carrier, either Elder Dempster & Co., or a substitute for it. The shipper therefore cannot say that it was the duty of the railroad company to provide means of ocean transportation, and when the proof shows that the railroad company has done all that was in its power to do as a common carrier with regard to the cotton, he cannot insist that the company shall be held to the full measure of a common carrier's liability while it was, as a matter of fact, only holding the cotton as warehouseman to await the convenience of the second carrier, also a party to the contract.

The Authorities Further Considered.

In Wood vs. Milwaukee & St. Paul Railway Co. (27 Wis., 541) the plaintiff shipped from Boston and New York 41 packages of merchandise consigned to himself at Winona, Minn. At Watertown in Wisconsin the

packages were delivered to the defendant, 35 of them on the 12th of May, 1870, and the remaining six packages on the following day, for transportation to La Crosse, which was the western terminus of defendant's line of railway. They were transported by the defendant to La Crosse, the 35 packages reaching there on the morning of May 13th, and the other six packages on the following morning. The custom of the defendant was to forward from La Crosse all goods consigned to Winona by the steamboat "Keokuk," which was a common carrier on the Mississippi River. The "Keokuk" made daily trips from La Crosse to Winona, usually leaving La Crosse at 8 A. M. and returning about 7.30 P. M. On her return she was accustomed to receive from the defendant all freight from Winona, which was ready for shipment, sometimes taking it on board in the evening, sometimes not until the following morning.

Between the railroad track and the river at La Crosse there were certain warehouses owned and controlled by the defendant from which goods were shipped on board the "Keokuk" and other steamers, and in which goods were received from such steamers. All goods received into these warehouses were distributed to different portions of them according to their destination; a portion of each warehouse was devoted to freight consigned to Winona. Soon after the arrival of plaintiff's goods at La Crosse and on the same day, they were taken from the cars, and placed in one of the warehouses in the part set apart for Winona freight.

The course of business at La Crosse between the defendant and the Packet Company in respect to the shipment of goods arriving by the defend-

ant's railroad was as follows: Upon the arrival of such freight the waybills accompanying the same were copied in a given freight book of the defendant, and entered by the yard matter in the train book. The freight was then checked into the warehouse of the defendant, and distributed to its appropriate place therein according to its destination. The bills of lading for the consignees were then made out from such waybills, and from these bills of lading two tally books were made, one for the check clerk of the defendant and the other for the steamboat which called for the goods; then the freight was ready to be delivered to the steamboat. This was all done by the employees and agents of the defendant. The goods were then taken from the warehouse by the employees of the packet company and placed on the boat, the second clerk of the boat, and the check clerk of the defendant attending with the tally books to verify the correctness of the shipment. After the freight was on board, the clerk of the boat signed a page of the manifest book, which had been made by copying into it the bills of lading of the goods shipped. After the freight was deposited in its appropriate place in the warehouse, it was handled entirely by the crew of the steamboat. It was not the custom for the defendant to give actual notice to the Packet Company of the arrival of freight at La Crosse for those points on the river, but the boats called at the warehouse of the defendant for such freight on their regular trips, taking all that was ready for shipment.

The goods of the plaintiff were not ready for delivery on board the "Keokuk" when she left for Winona on Saturday, May 14, because the bills of lading and manifest had not yet been made. They

were completed, however, when the boat returned that evening as to thirty-five packages, but the remaining six packages were never manifested. The "Keokuk" returned to La Crosse at the usual time Saturday evening, unloaded her down freight, and, after doing some towing, laid up at a wharf near another steamboat—the "War Eagle"—which was taking freight from the warehouse in which plaintiff's goods were stored. While the two remained in this position, and about one o'clock on the morning of Sunday, May 15, the "War Eagle" took fire; the flames communicated to the warehouse, and all its contents, including the goods of the plaintiff, were consumed.

The plaintiff brought suit for the value of the goods, and, upon the trial of the case, the trial Court adopted the position that there was no suspension of the liability of the defendant as common carrier until the goods were actually delivered to the Packet Company, and that, inasmuch as they were destroyed before such actual delivery, the defendant was liable to the plaintiff for their value. This position was overruled by the Supreme Court, and the position adopted that the liability of the railway company was that of warehousemen; that, as between connecting carriers, the first carrier holds for delivery to the next carrier under the same terms as to a consignee at the end of the route. Upon this point LYON, J. (p. 551), says:

"The liability of a carrier for goods after they have reached their destination and are waiting delivery to the owner or consignee has been adjudicated by this Court in Wood vs. Crocker (18 Wis., 344). It is held in that case that where goods are transported by a railroad company to the place of consignment, and there deposited in its warehouse, the liability of such company as a common carrier in respect to such goods does not thereby cease, but continues until the same

are ready for delivery to the owner or consignee thereof, and until he has had a reasonable opportunity to take them away.

"There is doubtless much conflict of authority on this subject, but the rule there adopted was thought by the Court to be sustained by the sounder reason and to accord best with well-settled principles of public policy. We are not disposed to disturb that rule, and it is entirely unnecessary to refer to the authorities which hold a different doctrine.

"I think that the same rule should be applied here. I can see no difference in principle between a case where the transit is ended, and the carrier holds the goods for delivery to the owner or consignee, and one where the carrier conveys the goods over a portion only of the route and holds them for delivery to some connecting carrier. For the purpose of receiving such delivery I think the connecting carrier must be held to be the agent of the owner (*Schneider vs. Evans*, 25 Wis., 241). I find no adjudicated case which makes any such distinction, although in *McDonald vs. Western Railroad Corporation*, 34 N. Y., 497, Mr. Justice HUNT does say that there is an important difference. This is a mere passing remark, however, no explanation of the grounds of difference being stated and no authority cited in support of the proposition. Besides, the question as to whether any such difference existed was of very small significance in that particular case. It is true the defendant in that case was held liable as a common carrier, but had this been ruled otherwise the carrier was evidently guilty of gross negligence in not forwarding the goods in due time, and would doubtless have been liable as a forwarder for the value of the lost goods. The cases cited by counsel for the plaintiff to show that the liability of the carrier as such does not cease until the actual delivery of the goods to the next carrier fail, I think, to establish that proposition.

"*McDonald vs. Western Railroad Corporation*, *supra*, and *Goold vs. Chapin*, 20 N. Y., 259, assert the opposite doctrine. See opinions of SMITH, J., in the former case (p. 502), and of STRONG, J., in the latter case (p. 267).

"In *Miller vs. Steam Navigation Co.*, 10 N. Y., 431, and in *Hooper vs. Chicago & N. W. R. R. Co.* [*ante*, p. 81], and also in *Goold vs. Chapen*, *supra*, it was held that the transit was not ended. In *Blossom vs. Griffin*, 13 N. Y., 569, and in *Ladue vs. Griffith*, 25 N. Y., 364,

the goods had been delivered to the carrier for transportation and were destroyed before the transit commenced."

It was in the overruling of this case that Justice DIXON made the observations quoted from *Conkey vs. Railway Company*, 31 Wis., and which appear *ante* page 53, and in which, as a substitute for the rule announced in the Wood case, he would treat the goods as having been delivered to the second carrier.

In Deming vs. Norfolk and Western R. R. Co., decided by Judge BUTLER, U. S. Circuit Court, Eastern District of Pennsylvania, Vol. 16, Am. and Eng. R. R. Cases, p. 234, we have a case very similar to the case at bar. The Norfolk and Western R. R. Co., the defendant, owned a railroad from Bristol, Tenn., to Norfolk, Va., connecting at Bristol with the East Tennessee, Virginia and Georgia Railroad, and at Roanoke, midway along its own line, with the Shenandoah Valley Railroad, which connected at Hagarstown with the Pennsylvania Railroad system. These various companies had contract arrangements for the conduct of through business. In October, 1883, the plaintiffs Deming & Co., cotton buyers at Memphis shipped at that point two lots of cotton destined for Woonsocket, Rhode Island; and on October, 11th another lot of 100 bales. The shipment was made upon the Memphis and Charleston Railroad and through bills of landing were given. The first clause of the bill of lading is:

"Received of A. B. the following packages marked, &c., to be transported by the Memphis and Charleston Railroad and connecting railway and steamship lines, to order, at Woonsocket, R. I., upon the following conditions:"

The eighth paragraph of the bill of lading is as follows:

"It is further stipulated and agreed that in case of any loss, detriment or damage done to or sustained by any of the property here receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred by the terms of this contract, that company alone shall be held answerable *therefor in whose actual custody* the same may be at the time of the happening of said loss, detriment or damage, and the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods."

The route over which the cotton was to be carried, as understood by the plaintiffs, was by the Memphis and Charleston road to Chattanooga; then by the East Tennessee, Virginia and Georgia Railroad to Bristol; then by the Norfolk and Western to Norfolk; then by the steamers of the Merchants' and Miners' Steamship Co. to Providence. The Merchants' and Miners' Transportation or Steamship Co. was running two lines from Norfolk, one to Boston and one to Providence. There were other lines running from Norfolk to Providence at the time of this shipment.

Upon the 15th of October the Merchants' Transportation Co. was unable to accept 500 bales of cotton until the next day on account of the accumulation of freight which had gradually grown from early in the month. Between the 15th and 23d of October there had been communication between the officers of the railroad company and the steamship company in reference to increased facilities for forwarding freight that was in transit. Other steamers were promised, but they did not come, although an extra steamer was expected in a few days on the 23d of October; and when the first shipment of this lot of cotton arrived at

Norfolk about 12,000 bales of cotton had accumulated on the wharves and in the warehouses of the steamship company. On the 23d of October the agent of the railroad company tendered delivery of the cotton in due course to the steamship company but no more could be conveniently stored upon the wharf of the steamship company, and the agent of the steamship company declined to accept the cotton, upon the ground that he had no place to store it, but proposed that, if the railroad company would unload and store in its own warehouse and on its wharf about 2,000 bales of cotton, he would pay for insurance upon it, and send a steamer in a few days to remove it. This wharf is the regular terminus of the railroad of defendant in the City of Norfolk and accessible equally with that of the steamship company to steamers. In reliance upon the assurance from the officers of the steamship company that an additional steamer would be sent to remove the cotton within a few days, and in view of the actually existing impossibility of its receipt by the Transportation Co., the superintendent of the railroad company authorized the Norfolk agent to unload the cotton and effect insurance upon it in the name of the Norfolk and Western Railroad Co. for account "of whom it may concern." On October 26, a thousand additional bales were received and unloaded upon the railroad company's wharf under the same arrangement; and between October 22d and 31st there arrived in all 3,028 bales, all of which were stored on the railroad company's wharf.

On the morning of the 14th of November a fire occurred and destroyed the larger part of the cotton stored on the railroad company's wharf. None of the loose cotton saved could be identified, and it was sold

under the direction of the fire underwriters, and the proceeds deposited for the benefit of whom it might concern.

It will be observed that the cotton in this case was in the "actual custody" of the defendant railway company, under an arrangement with the connecting steamship company by which the railway company "acquiesced in the delay" in delivery of the cotton to the steamship line.

Upon these facts, Judge BUTLER, after defining the defendant's obligations as an intermediate common carrier, which were for the safe carriage over its own line and delivery or tender to the next carrier beyond within a reasonable time, under all the exemptions allowed by the shipper and according to the terms of the bill of lading says:

"Such being the defendant's obligations, did it discharge them? It carried the merchandise safely and expeditiously to Norfolk. When the first consignment arrived on the 23d of October, it was tendered to the Merchants' & Miners' Steamship Co., and was refused on account of accumulation of freight on its wharves, with the request or proposal, however, to place it and subsequent consignments on the wharf and in the warehouse of the defendant (a place as convenient for loading into the steamboat company's vessels as on its own wharf), and with the assurance that vessels would speedily be provided and sent there for it. *This request was complied with under a reasonable expectation that the steamship company would load and forward the cotton without unreasonable delay. Placing the subsequent consignments as proposed was a substantial tender. The designation of this place for loading was a virtual designation of the place for tender.*

"To hold that the defendant should have hauled the cotton which arrived on the 26th to the steamship company's wharves in view of what had occurred would be unreasonable and unjust. The fact that insurance was procured is unimportant. Should the defendant have done more?

In view of the facts, it was not required to forward by any other route, nor would it have been justified in doing so. The steamship company was the carrier contemplated by the plaintiff. Indeed, it must be regarded as having been designated by him. If not on shipment at Memphis, it certainly was on delivery to the defendant. Those so delivering represented the plaintiff. That a preceding carrier represents the shipper in forwarding by his successor on a through line (under ordinary circumstances) is settled. The plaintiff's insurance would have been revoked by the substitution of any other route. Besides this, as already stated, the defendant was fully justified in believing that the merchandise would be accepted and carried within a reasonable time by the steamship company and would reach its destination more expeditiously by this route than any other. But for unforeseen circumstances which could not be anticipated, this expectation would have been realized. Furthermore, it can hardly be said that there was any other practically available route. The defendant was not, therefore, in fault.

Under the authority of these cases, therefore, we contend that if the words "actual custody" in the bill of lading are to have any special significance attached to them, while they may be controlling as to the particular carrier which may be liable as between the defendant and the steamship line, yet that they do not in any way import any significance as to the test of liability of the one which is liable. The nature of the liability is left to be determined by the facts and the principles of law applicable thereto in view of all the circumstances of the case. Under the circumstances of this case we insist that if the defendant is the one to whom these words affix whatever liability there is for the cotton destroyed upon the wharf at Westwego, on the 12th of November, 1894, the test of the defendant's liability under the facts shown here is not that of a common carrier but of a warehouseman, and that the

Court was therefore wrong in directing a verdict for the plaintiff.

III.

The judgment rendered and order of affirmance should be reversed.

Respectfully,
RUSH TAGGART,
Atty. for Texas and Pacific Railway Company.

RUSH TAGGART,
ARTHUR H. MASTEN,
Of Counsel.